

(27,029)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 943.

T. M. DUCHE & SONS, LTD., PETITIONER,

VS.

AMERICAN SCHOONER "JOHN TWOHY," HER TACKLE,
&c., ALBERT D. CUMMINS AND HOWARD COMPTON,
CLAIMANTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

T. M. DUCHE & SONS
(Buenos Aires), Ltd., a
corporation,

vs.

AMERICAN SCHOONER
"JOHN TWOHY," whereof
John Forsyth now is or
late was Master.

No. 10 of 1916.

Conlen, Brinton & Acker.

Harrington, Bigham &

Englar.

Howard M. Long.

Feb. 11, 1916, Libel filed, process allowed. Stipulation for costs by National Surety Company in \$250.00 taken and filed. Attachment exit returnable February 18, 1916.

Feb. 11, 1916, Attachment returned endorsed with agreement that claim may be filed and stipulation entered with same force and effect as if vessel had been attached by the Marshal without prejudice to right of either party to move for reduction of security.

Feb. 16, 1916, Claim of Albert D. Cummins part owner of Schooner "John Twohy" taken and filed.

- Feb. 21, 1916, Stipulation of Albert D. Cummins with National Surety Company as surety in \$3000.00 taken and filed.
- Apr. 22, 1916, Answer filed with Exhibits "A" and "B."
- Apr. 22, 1916, Answer to interrogatories filed.
- Sept. 16, 1916, Order to place case on trial list filed.
- May 14, 1917, Final hearing of testimony in open court.
- June 6, 1917, Argued sur pleadings and proof.
- June 12, 1917, Testimony taken in open court filed.
- June 12, 1917, Opinion Dickinson, J., on final hearing filed.
- June 26, 1917, Petition by libellant for rehearing filed.
- June 26, 1917, Order, Dickinson, J., granting rule to show cause why prayer of petition for rehearing should not be granted, returnable sec. leg., proceedings to stay.
- Nov. 1, 1917, Reargument on final hearing in open court.
- Nov. 8, 1917, Order refusing motion for reargument filed.
- Apr. 2, 1918, Libellant's bill of costs filed.
- Apr. 16, 1918, Final decree filed.
- Apr. 27, 1918, Assignments of error filed.
- Apr. 27, 1918, Petition for appeal filed.
- Apr. 27, 1918, Order of court allowing petition for appeal filed.
- Apr. 27, 1918, Stipulation of counsel as to transcript of record sur appeal and waiver of additional bond sur appeal, filed.
- Apr. 27, 1917, Citation allowed and issued.
- Apr. 30, 1918, Citation returned "service accepted" and filed.

LIBEL AND COMPLAINT.

(Filed Feb. 11, 1916)

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

T. M. DUCHE & SONS (Buenos Aires), Ltd., VA. SCHOONER "JOHN TWOHY," her tackle, etc.	} IN ADMIRALTY. No. 10 of 1916. LIBEL AND COM- PLAINT.
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*To the Honorable, the Judges of the District Court
of the United States for the Eastern District
of Pennsylvania, Sitting in Admiralty:*

The libel and complaint of T. M. Duche & Sons (Buenos Aires), Ltd., a corporation organized and existing under and by virtue of the laws of Argentine Republic, against the American schooner "John Twohy," whereof John Forsyth now is or late was master, against the said schooner, her tackle, apparel and furniture and against all persons lawfully intervening for their interest therein in a cause of damages for breach of charter party of affreightment, civil and maritime, sheweth:

1. That the libellants were at all the times hereinafter mentioned the charterers of the American schooner "John Twohy," a four masted American

schooner hailing from the port of Philadelphia, and the owners of the cargo of bones hereinafter referred to.

2. That on or about July 9th, 1915, the libellants at Philadelphia, Pennsylvania, through their agents, Messrs. J. H. Cottman & Company, by a certain charter party of affreightment, a copy of which is hereto attached, made part hereof and marked Exhibit "A," did charter from its owners, Messrs. A. D. Cummins & Company of the City of Philadelphia, the said schooner "John Twohy" then at sea on a voyage from Philadelphia to the River Plate, for a voyage from Buenos Aires to Philadelphia to carry a full and complete cargo of bones.

3. That the said schooner, after discharging her outbound cargo, proceeded to the port of Buenos Aires and there, on or about October 16th, 1915, libellants shipped on board said vessel in good order, well conditioned and free from damage, a full and complete cargo of bones weighing 1,210,000 kilos to be carried and transported in the said vessel to the port of Philadelphia and there to be delivered on payment of freight in accordance with the terms of the said charter party.

4. That upon delivery^s of said cargo to said vessel the libellants received therefor a bill of lading signed by the master of the said schooner, a copy of which is hereto attached, made part hereof and marked Exhibit "B."

5. That the said 1,210,000 kilos referred to in the said bill of lading is the equivalent of 2,670,345 pounds avoirdupois.

6. That after loading the said cargo, the said schooner left Buenos Aires with said cargo on board and proceeded on her voyage to the port of Philadelphia where she arrived on or about December 27th, 1915, and three days thereafter, to wit, on December 30th, 1915, began discharging the said cargo.

7. That notwithstanding its said agreement to safely carry the said bones to Philadelphia and there deliver the same, the said schooner did not safely carry and deliver the whole of the said cargo of 2,670,345 pounds of bones, but on the contrary the actual weight of the cargo delivered by the said schooner was only 2,583,581 pounds; that included in this amount was 389,407 pounds of bones which were wet and damaged by sea water; that the weight of the said sea water contained in the 389,407 pounds of cargo was 62,305 pounds, as was agreed between the owners of the said vessel and the agents of libellants; that the net weight of the bones delivered was, therefore, 2,521,276 pounds, wherefore the said schooner wholly failed to deliver 149,069 pounds of said bones.

8. That the said 149,069 pounds of bones which the said schooner failed to deliver, after deduction of freight thereon, were of a value of \$1612.26, which amount has been wholly lost to libellant by reason of the failure of the schooner to perform its said contract and agreement as aforesaid.

9. That the said loss was not caused by perils of the sea or by any other cause for which the said schooner by the said charter party or bill of lading or otherwise was not liable, but was on the contrary

wholly and entirely caused by and due to the unseaworthiness of the said schooner and the negligence, carelessness, improper conduct and want of attention of the master, his mariners or servants, whereby the said 149,069 pounds of bone aforesaid became and are wholly lost to libellants by not having been delivered as by the said contract of affreightment and the bill of lading signed thereunder was stipulated and agreed.

10. That libellant has suffered further damage by reason of the fact that although the said cargo of bones when the same was loaded on the said schooner was in every respect dry and in good order and condition, yet that the said schooner while on her voyage and shortly after she cleared the port of Buenos Aires bound for Philadelphia began to leak and to ship through her seams great quantities of water so that a large part of said cargo, to wit, 389,407 pounds thereof were wet and damaged.

11. That in and by the said charter party aforesaid, a copy of which is hereto attached, it was warranted by the owners that the said schooner was tight, staunch, strong and in every way fitted for the intended voyage, but notwithstanding said warranties said schooner was not tight, staunch, strong and in every way fitted for the intended voyage, but on the contrary the said schooner at the beginning of the said voyage was unseaworthy and not fitted to carry the said cargo on the said voyage.

12. That the said leak was not due to or occasioned by any dangers of the seas, rivers or navigation of any nature or kind whatsoever, but on the contrary

was due wholly and entirely to the unseaworthiness of the said schooner and her unfitness for the voyage.

13. That the said cargo, however, when discharged, was not in like good order and condition as when received, but on the contrary by reason of the said leakage a large part of the said cargo of bones, to wit, 389,407 pounds thereof, were as aforesaid wet and seriously damaged by the said sea water and while the said damaged portion of the said cargo was not totally lost to libellant, libellant by reason of such damage to said portion of the cargo has sustained damage in the sum of \$932.24.

14. That the said damage was the result of the unseaworthiness of the said vessel and of the fault and negligence of the owners of the said schooner, her officers and crew.

15. That by reason of the failure of the said schooner to deliver the whole of said cargo, viz.: to the extent of 149,069 pounds thereof, libellant has as aforesaid suffered damage in the sum of \$1612.26, and by reason of the damage to a part of said cargo, viz.: 389,407 pounds thereof, libellant has, as aforesaid, suffered damage to the extent of \$932.24 or in all libellant has suffered damage in the amount of \$2544.50 to recover which this suit is brought.

16. That the said schooner is now in the port of Philadelphia within the Eastern District of Pennsylvania.

17. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore libellant prays that process of attachment in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said schooner "John Twohy," her tackle, apparel and furniture, and that the said John Forsyth, master, and all other persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters so articulately propounded; and that this Honorable Court will be pleased to pronounce for the damages aforesaid with costs and that the said schooner, her tackle, apparel and furniture may be condemned and sold to pay the same, and that the Court will grant to libellant such other and further relief as to the libellant shall in law and justice appertain.

T. M. DUCHE & SONS (BUENOS AIRES), LTD.

By JOHN W. WEST,
Agent.

CONLEX, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss:

JOHN W. WEST, being duly sworn according to law, deposes and says that he is agent of T. M. Duche & Sons (Buenos Aires), Ltd., libellant named in the foregoing libel; that he is duly authorized to make this affidavit on their behalf; that he is especially informed as to the facts set forth in the foregoing libel and that the same are true.

JOHN W. WEST.

Sworn to and subscribed before me this 4th day
of February, A. D. 1916.

ROY L. ZENO,
(Seal) *Notary Public, Kings Co., No. 16.*
Certificate filed in N. Y. Co., No. 19.

EXHIBIT "A."

RIVER PLATE SAIL CHARTER PARTY.

Phila. Pa. July 9, 1915.

IT IS THIS DAY MUTUALLY AGREED between A. D. Cummins & Co. owners of the U. S. Schooner "John Twohy" called the "John Twohy," classed A. 1½., and to be of that class at time of loading, of the measurement of 909 tons register, or thereabouts and about 1650 English tons dead weight capacity now at sea bound to the River Plate with cargo of lumber from Philadelphia, and T. M. Duche & Sons, Ltd. Charterers.

That the said vessel being tight, staunch, strong and in every way fitted for the intended voyage, shall with all convenience be after discharge of her outward cargo proceed as directed by Charterers or their Agents to a safe berth in Buenos Aires where she can safely lie, always afloat, there to load from the Charterers or their Agents a full and complete cargo of bones in bulk consisting of one half consumo bones and one half machine crushed bones; which the said charterers hereby bind themselves to ship, not exceeding what she can reasonably stow and carry under hatches, over and above her tackle, apparel, provisions and furniture. No other goods to be received on board nor any part of the cargo to be stowed in the cabin without the Master's and Charterer's mutual consent.

The vessel being so loaded shall therewith proceed to Philadelphia or so near thereunto as she can safely get, always afloat and there deliver the cargo in conformity with the bills of lading on being paid freight as follows:

Six Dollars (\$6.00) U. S. Gold per ton of 2240 lbs. gross weight delivered but freight to be paid on not less than 1100 tons.

Sufficient cash for the vessel's ordinary disbursements at the port of loading not exceeding one-third of the freight to be advanced on account of same to the master (if required by him) by the charterers or their agents, free of commission, but subject to a premium of $7\frac{1}{2}\%$ to cover interest and insurance, and the balance on the right and true delivery of the cargo in cash without discount.

The vessel to be approved by Underwriters Agent before loading if required by Charterers, cost of Survey and Certificate to be at expense of Charterers.

The master to sign bills of lading if required, at any rate of freight without prejudice to this Charter, and Charterers to have the option of subletting part or whole of the vessel under their responsibility. Any difference in freight to be settled on signment of said bills of lading; if in master's favor in cash, less insurance if in Charterer's favor, by master's draft on his Consignee, payable ten days after arrival of vessel at port of discharge.

The cargo to be brought to and taken from alongside the vessel at Charterers' risk and expense.

The stevedores for loading to be appointed by Charterers or their agents and paid by the master, but at not more than current rates, say One dollar and twenty-five cents (\$1.25) Arg. Paper per ton.

Permanency, wharfage, Quay and dock dues if any at port of loading to be for account of charterers.

The master to apply at loading port to charterers or their agents for cargo and at port of discharge to charterers' agent, paying two per cent address commission.

Twenty (20) running days (Sundays and Holidays excepted) to be allowed the said charterers for loading cargo, if the vessel be not sooner despatched; the said days to commence twenty-four hours after the master has given written notice, between 9 A. M. and 6 P. M. to charterers or their agents, that his vessel is ready for loading.

The discharge to be effected as customary at port of discharge.

Any days on demurrage over and above the said laydays at port of loading shall be paid for by the charterers or their agents to the vessel at the rate of four pence per net Reg. ton per day, to be paid day by day as falling due and likewise for any detention in taking delivery of cargo at port or ports of discharge.

The said laydays shall not commence to count before the vessel is ready for cargo, unless it be mutually arranged otherwise.

Time employed in taking in or out ballast or shifting ports of loading or detention by quarantine not to count as laydays but vessel to be considered ready for cargo, even with stiffening ballast on board.

The owners or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of freight, deadfreight, demurrage, average and all other charges whatsoever but charterers responsibility to cease upon shipment of the cargo, provided same is worth the freight, deadfreight, demurrage, etc. on arrival at port of discharge.

The Act of God, restraints of Princes, Rulers and

People, Strikes or Lockouts (but not of the charterers' or receivers' workmen only) Fire and all and every other danger and accident of the Seas, Rivers and Navigations, of any nature and kind whatsoever during the said voyage, always excepted even when occasioned by negligence, default or error of judgment of the Pilot, Master, Mariners or other servants of the ship owners.

Average if any payable according to York Antwerp Rules 1890.

Penalty for non-performance of this agreement proved damages not exceeding estimated amount of freight.

Five per cent brokerage on the above gross freight, deadfreight and demurrage is due by the vessel to A. D. Cummins & Co. on signing the charter party, vessel lost or not lost, charter cancelled or uncanceled.

Charterers have the privilege of cancelling this charter party if the vessel does not report for cargo by October 31, 1916.

Charterers to have the option of appointing agent to do the ship's business at Buenos Aires at a fee of Fifty Dollars U. S. Gold.

A. D. Cummins & Co.

T. M. Duche & Sons, Ltd.

J. H. Cottman Co., Agents

By Cable Authority 7/15/15

Signed in the Presence of

Louis H. Haldt.

EXHIBIT "B."

T. M. Duche & Sons (Buenos Aires) Ltd.
Exporters
San Martin 362
Buenos Aires

SHIPPED in apparent good order and condition by T. M. Duche & Sons (Buenos Aires) Ltd. of Buenos Aires on board the North American Schooner, "John Twohy" whereof John Forsyth is Master for this present voyage, and now lying in the port of Buenos Aires and bound for Philadelphia the following goods: A FULL & COMPLETE CARGO OF BONES WEIGHING ONE MILLION TWO HUNDRED AND TEN THOUSAND KILOS 1,210,000 marked and numbered as per Kilos Bones margin and to be delivered in the like good order and condition at the aforesaid port of Philadelphia (all and every dangers of the seas, In This rivers and navigation of what- Quantity Is soever nature or kind excepted, Included including the negligence clause) 12,747 Kilos unto ORDER or to his or their In 287 Bags assigns, he or they paying freight for the said goods with all other conditions as per charter party dated Philadelphia, July 9th, 1915 and Average accustomed.

In witness whereof the Master of the said ship or vessel has signed THREE Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Buenos Aires October 16th, 1915.

John Forsyth
Master.

Interrogatories.

Interrogatories propounded to respondent, claimant, which it is required to answer under oath:

First Interrogatory: What is the age of the schooner "John Twohy"? When, where and by whom was she built? Since she was built has she been steadily operated? If no, state when and for what periods she was out of commission. Where did she lie when out of commission? State when she was last out of commission prior to October 16th, 1915—for how long a period and between what dates.

Second Interrogatory: When and where was the schooner "John Twohy" last repaired prior to her voyage of October, November, December, 1915, from Buenos Aires to Philadelphia? What was the nature and extent of such repairs? Answer fully giving details and cost. What persons, firms or corporations made such repairs? Answer particularly giving names and addresses. Where, when and by whom was she last given a general overhauling prior to the voyage in question?

Third Interrogatory: What if any measures, means, instruments or devices were used for strengthening and or stiffening the "John Twohy" last prior to her departure from Philadelphia for the River Plate on the voyage immediately prior to the voyage from Buenos Aires to Philadelphia under the charter party dated July 9th, 1915? If more than one measure, means, instrument or device were used, state all. Answer fully and in detail.

Fourth Interrogatory: What if any changes were

made in the measures, means, instruments and devices covered by the third interrogatory, after the same were installed or put into use, and before the departure of the vessel from Buenos Aires on the voyage under the charter party of July 9th, 1915? Answer fully and in detail stating when and where such changes were made, of what such changes consisted, which if any of such means, measures, instruments or devices were disposed of, with the reasons therefor.

Fifth Interrogatory: When and by whom was the "John Twohy" last classed or rated and for what period? How was she classed or rated (1) on July 9th, 1915, (2) when she arrived at Buenos Aires ready to load cargo under the charter party of July 9th, 1915, and (3) when she sailed from Buenos Aires on her voyage under said charter party?

Sixth Interrogatory: What are the measurements of the "John Twohy," her tonnage and capacity? State fully giving length, overall and waterline, breadth and depth. Of what material and in what manner is she constructed? Answer fully.

Seventh Interrogatory: Specify in detail into what holds and cargo compartments the vessel was divided and state exactly how she was loaded, showing what merchandise was loaded in each cargo compartment and the quantity thereof, and where and when each of such lots of merchandise was loaded on board of said vessel for the voyage from Buenos Aires to Philadelphia under the charter party of July 9th, 1915.

Eighth Interrogatory: Where, when and by whom

was the "John Twohy" last surveyed prior to making the voyage under the charter party of July 9th, 1915? Attach copy of report of said survey. Were the recommendations of such survey carried out and complied with? Answer specifically showing whether such recommendations were complied with wholly or in part, and, if in part only, to what extent.

Ninth Interrogatory: What weather was encountered by the vessel on its voyage from Buenos Aires to Philadelphia under the charter party of July 9th, 1915? State fully and in detail. Attach copy of ship's log for the voyage.

Tenth Interrogatory: With what pumping equipment was the vessel supplied on the voyage in question? State particularly, giving number, size, capacity, condition, location and means or method of operation of all pumps and the purpose for which used. Were any or all of such pumps used during said voyage? If yes, state fully when, on what occasions, and in each instance for how long a time and with what effect.

Eleventh Interrogatory: Give the location of the leak or leaks through which the water came into the vessel on the voyage from Buenos Aires to Philadelphia under the charter party of July 9th, 1915. When was the leaking first noticed? How much water was then in the vessel? State fully and in detail all changes in the height of the water in the vessel from the time when the leak was first noticed until the completion of the discharge of the cargo at Philadelphia, giving all soundings taken with the day and hour thereof.

Twelfth Interrogatory: When did the "John

Twohy" leave Philadelphia for the River Plate on the voyage immediately preceding that made under the charter party of July 9th, 1915? When did she arrive at her destination on said voyage? What cargo did she carry? What was the condition of said cargo upon its discharge at River Plate? State fully and in detail and if the same was damaged give the extent and nature of such damage and how caused.

COSLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

ANSWER.

(Filed April 22, 1916)

The answer of Albert D. Cummins of Philadelphia, Pa., and Howard Compton of Leesburg, N. J., the owners of the schooner "John Twohy," her tackle, apparel, furniture, engines, boilers and machinery to the libel and complaint of T. M. Duche & Sons, Ltd., against the said schooner "John Twohy," her tackle, apparel and furniture, in an alleged cause of damages for breach of contract of affreightment, civil and maritime, sheweth:

i. That at all the times hereinafter mentioned the claimants were the owners of the schooner "John Twohy," a four masted American schooner hailing from the port of Philadelphia, and that at all the said times the said schooner was tight, staunch, strong and seaworthy and properly manned and equipped, and was classed A1½ for a period of five years from April, 1915, in the American Bureau of

Shipping, a classification society, and under said certificate was allowed to carry dry and perishable cargoes, a copy of such certificate is hereto attached, made part hereof and marked Exhibit A. The dimensions of said schooner were as follows: 201 ft. length, 30 ft. beam, 19 ft. depth, 909 tons net register, 1020 gross register, dead weight capacity 1600 tons.

2. Claimants admit the allegations contained in the first paragraph of the said libel.

3. Claimants admit the allegations contained in the second paragraph of the said libel, and in this connection claimants aver that A. D. Cummins & Co. is now and was at the times mentioned, Albert D. Cummins trading under the firm name of A. D. Cummins & Co. and that the said Albert D. Cummins together with Howard Compton were then and are now the owners of said schooner.

4. In answer to the third and fourth paragraphs of said libel claimants admit that the libellants shipped on board said schooner at Buenos Aires on or about October 6, 1915, a full and complete cargo of bones to be carried and transported by said vessel to the port of Philadelphia and was to be delivered on payment of freight in accordance with the terms of said charter party and the bill of lading attached to the said libel and made Exhibit B. Claimants aver that these bones were not weighed by them nor under their supervision nor by any person having authority to act for them, but that said weights were the weights supplied by the shipper. Claimants also aver that they made no examination of the said cargo of bones in order to determine the condition,

but that said bones were apparently in good order and well conditioned and free from damage. Claimants admit that upon delivery of said cargo the libellants received from the master a bill of lading copy of which was annexed to the libel and made part thereof marked B.

5. Claimants admit the allegations contained in the fifth paragraph of the libel.

6. Claimants admit the allegations contained in the sixth paragraph of the libel.

7. In answer to the seventh paragraph of the libel the claimants deny that they or the said schooner failed to safely carry and deliver any part of the said cargo of bones so laden on said schooner. Claimant admits that a certain amount of the cargo of bones was wet and damaged by sea water which had leaked into the vessel during the voyage. Claimants did not weigh said portion of said cargo and therefore have no actual knowledge of the amount, and for greater certainty demand strict proof of the amount of the same. Claimants aver that after said cargo had been delivered the libellants and consignees refused to pay the balance of freight due upon said cargo and that thereupon the claimants caused libel to be filed in the United States District Court for the Eastern District of Pennsylvania against the said cargo of bones, to recover the said balance of freight, said cause being No. of 1916 in admiralty. That in the settlement of said suit it was agreed that the suit should be compromised by allowing to the libellants a certain deduction of freight, viz.: that the libellants should not be required to pay freight on 62,305 pounds of said

cargo which the libellants and consignees estimated to be the increased weight of said cargo due to its being wet by sea water. Claimants deny the other allegations contained in the seventh paragraph of said libel.

8. Claimants deny the allegations contained in the eighth paragraph of said libel.

9. Claimants deny the allegations contained in the ninth paragraph of said libel.

10. Claimants deny the allegations contained in the tenth paragraph of said libel in so far as they are not admitted in subsequent paragraphs of this answer.

11. Claimants admit that under said charter party it was provided that the said schooner was tight, staunch, strong and in every way fitted to make said voyage with said cargo of bones. Claimants deny all other allegations contained in the eleventh paragraph of said libel.

12. Claimants deny all the allegations contained in the twelfth paragraph of said libel.

13. In answer to the thirteenth paragraph of the libel claimants admit that a certain portion of the cargo, the amount of which they have no definite information, received some damage by reason of sea water which came into said vessel during the voyage. Claimants however demand strict proof as to the amount thereof. Claimants deny that the amount of damage sustained was in the sum of \$932.24 and demand strict proof of the amount of such damage if

material. Claimants deny however that they or said schooner are legally responsible for any damage to said cargo and aver that any damage received to said cargo was occasioned by the Act of God the dangers and accidents of the seas, rivers and navigation and such were the perils expressly excepted by the charter party and bill of lading.

14. Claimants deny the allegations contained in the fourteenth paragraph of said libel.

15. Claimants deny the allegations contained in the fifteenth paragraph of said libel.

16. Claimants admit that the said schooner was in the port of Philadelphia at the time the libel was filed.

17. Claimants deny that all and singular the premises of the libel are true, but admit the jurisdiction of the Court.

18. Further answering said libel and as a further defense thereto claimants aver that on or about July 9th, 1915, at Philadelphia, Pa., the claimants as owners of the schooner "John Twohy" through A. D. Cummins & Co. entered into a charter party with libellants, copy of which charter party is attached to the libel and marked A. That in the spring and summer of 1915 the said schooner had been thoroughly overhauled and repaired at Philadelphia, Pa., and at Camden, N. J., and had received a classification or rating from the American Bureau of Shipping, a classification society, of A1½ which rating she was entitled to hold for a period of five years from April, 1915, a copy of which certificate of classification is hereto attached, made part hereof and

marked Exhibit A. That said schooner left the port of Philadelphia under charter with cargo of spruce and white pine lumber bound on a voyage to Rosario via Buenos Aires, Argentine Republic. That after said schooner had departed on her voyage the charter party with libellants was made and executed. Said schooner safely arrived at her destination, and made delivery of her cargo. While said schooner was proceeding on her voyage it was found that one of the turnbuckle rods which had been put into her at the repair yard was too slack, so that after the vessel arrived at her destination and before loading libellants' cargo, it became necessary to have the rod adjusted, and it was taken out and the hole plugged up and made tight. The vessel then loaded the cargo for libellants and after the same had been loaded the bill of lading (copy of which was attached to the libel) was signed by the master of the schooner and she was prepared to proceed on her voyage back to Philadelphia. At the time of loading said cargo neither of these claimants nor John Forsyth, the master, nor any person acting for said schooner had any definite knowledge as to the weight and amount of libellants' cargo. The weights contained in the bill of lading were inserted by libellants through their agents and the bills of lading were signed by said schooner's master who relied upon the weights put therein by libellants being correct. No examination was made by the master of the condition of said cargo and the statements as to the condition as stated in the bill of lading were placed therein by the libellant and the said master executed the bill of lading upon the faith that the statements were true but without any definite knowledge as to the condition of the cargo.

The schooner sailed from Buenos Aires on or about

October 21st, 1915, and the voyage was without incident until Oct. 30, 1915, when the schooner encountered a northeast gale with heavy seas, which gale increased with heavy squalls, and the heavy seas caused the vessel to roll and labor heavily; about 2 P. M. of said day the wind changed to west southwest with heavy squalls and heavy seas continuing and causing the vessel to start leaking. October 31, 1915, the weather was clearing, wind still strong, and at 4 P. M. there was a heavy blow of wind with heavy seas. This situation continued and at 7 P. M. of that day the schooner was compelled to take in some of her sails and run before the wind and sea with her decks continually full of water and the vessel rolling and laboring heavily and at 8 P. M. the cabin was flooded with water and the vessel was leaking badly. At midnight the gale increased with terrific squalls, causing the vessel to strain badly. In the morning of Nov. 1st the wind moderated so that the vessel could be put on her course, late in the day the seas went down and the vessel proceeded on her voyage. From November 1st to December 20th the vessel proceeded on her voyage which was without incident. December 20th, the weather became overcast and threatening and on Dec. 21 the wind increased and on the following day the schooner encountered cloudy weather and strong breeze from the northwest with heavy seas, which wind afterward changed and blew strong from north northwest, so that at 4 A. M. it was necessary for the schooner to take in part of her sails and the wind continued to increase that day until 8 P. M. it was blowing a gale from northwest with heavy seas causing the vessel to roll and strain. This condition of weather continued all that day, wind moderated on the 23rd so that the schooner encountered light breeze

so that she proceeded on her voyage but was leaking about six inches per hour. This condition continued on the 24th and 25th. December 26th started with cloudy weather south southwest breeze which changed at 4 P. M. to south and at 6 P. M. the wind was increasing so that the schooner had to take in some of her sail; 8 P. M. of that day the wind had increased to a very strong southeast gale with heavy seas and heavy rain, wind became stronger so that the vessel had to take in her foresail and at 2 A. M. wind came out from northwest and blew with hurricane force, causing the vessel to roll and strain heavily. This situation continued until 8 A. M. when the gale and sea moderated and it continued to moderate until the 27th when the vessel at about 11 A. M. passed Over Falls Light Ship at the entrance to Delaware Bay, where she took a pilot on board and proceeded to Philadelphia where she arrived on the morning of December 28th. Upon the arrival of the schooner at Philadelphia the captain made a note of protest which he afterward extended on January 7, 1916, copy of which extended protest is hereto attached, made part hereof and marked Exhibit B.

That although the schooner at the time she proceeded on her voyage from Buenos Aires was tight, staunch, strong and seaworthy, properly manned and equipped, and fitted for her voyage with her cargo, and although said condition continued for a period of about ten days during the progress of the voyage, the said schooner after that time solely by reason of heavy gales of wind, bad weather and heavy seas encountered by her, became strained and began to leak, and the said leak continued until she had reached the smooth water of Delaware River and Bay. During all this time however the master and crew of

said schooner by reason of the efficient steam pumps were enabled to so control the leak as to prevent any serious damage to either the vessel or her cargo.

After the cargo had been discharged from said schooner it was found that a small portion thereof had become wet from the sea water taken into the vessel as a result of her experience with the gales of wind, heavy seas and bad weather. After her discharging had been completed libellants and consignees refused and neglected to pay the balance of freight to said claimants for the transportation of said cargo and thereupon the claimants filed a libel to recover the same being No. of 1916, U. S. District Court, Eastern District of Pennsylvania, to which libel and proceedings thereunder your claimants beg to refer in this case. No answer was filed to the said libel but a settlement of the freight was made whereby it was agreed that for the purpose of that suit there should be deducted from the freight due claimants the sum of money equal to freight on 62,305 pounds; that said agreement was a compromise of the claim for freight and was made in the said suit so brought to recover said freight and has absolutely no application to the within suit. That the amount of said reduction was based upon an estimate made by libellant's agents and that said deduction was made solely for the purpose of having the freight suit adjusted.

19. Claimants further aver that said cargo was but slightly if to any extent damaged and that such damage was solely occasioned by the perils expressly excepted in said charter party, viz.: "The Act of God, restraints of Princes, Rulers and People, Strikes or Lockouts (but not of the charterers' or receivers' workmen only) fire and all and every other danger

and accident of the seas, rivers and navigation of any nature and kind whatsoever during the said voyage, always excepted even when occasioned by negligence, default or error of judgment of the pilot, master mariners or other servants of the ship owners," as well as the perils expressly stipulated in the said bill of lading, viz.: "all and every danger of seas, rivers and navigation of whatsoever nature or kind excepted, including the negligence clause."

Claimants further aver that at the time said charter party was made the said vessel was not only tight, staunch, strong and seaworthy and in every way fit for said voyage, but they had used all due diligence to put said schooner in such condition and had received said certificate of seaworthiness and said rating and classification from the said classification society as shown by Exhibit A. That if said cargo was damaged and the libellants have been damaged as a result thereof, such damage was not caused or occasioned by any fault or unseaworthiness of said vessel or of any fault, negligence or carelessness on the part of these claimants, or on the part of her master or crew or any person for whom the claimants are responsible, but was caused solely by danger and accidents of the seas, rivers and navigation.

That all and singular the premises of this answer are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore these claimants pray that the libel be dismissed with costs.

HOWARD COMPTON,
A. D. CUMMINS & Co.,
ALBERT D. CUMMINS,
Claimants.

HOWARD M. LONG,

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

ALBERT D. CUMMINS, being duly sworn according to law, deposes and says that he is one of the claimants named in the foregoing answer, that the facts stated therein as of his own knowledge are true, and as to the facts stated on information and belief he believes them to be true.

ALBERT D. CUMMINS.

Sworn to and subscribed before me this 21st day of April, A. D. 1916.

KATHERINE M. COLLINS,
Notary Public.

(Seal)

Commission expires Feb. 21st, 1919.

ANSWERS TO INTERROGATORIES.

Answer to First Interrogatory. The schooner "John Twohy" was built at Newburyport, Mass., by G. E. Currier in 1891. She has been steadily operated with the exception of the period from November, 1913, to February, 1915, at which time she was lying at Southport, N. C., and at Philadelphia in a wrecked condition.

Answer to Second Interrogatory. The schooner "John Twohy" was last repaired prior to her voyage of October, November, December, 1915, at Philadelphia, repairs being started February 23, 1915, and completed June, 1915. Nature and extent of such repairs, general overhauling subject to requirements of American Bureau of Shipping superintended by

their surveyor; repairs being satisfactory to them they granted the vessel an A1½ class for five years, which stated the vessel to be in fit condition to carry dry and perishable cargoes. This certificate will be offered as an exhibit. Cost of such repairs \$22,000. repairs to hull were made by Philadelphia Ship Repair Co., Mifflin St. Wharf, Phila., Pa., and by John H. Mathis Co., Cooper's Point, Camden, N. J.

Answer to Third Interrogatory. Vessel was re-treenailed bottom and top sides, all butts and wood ends respiked, caulked all over, 8 new beams, two lock strakes in between decks, one 10 by 12 and one 12 by 12; about one-third of between decks new, 26 new hanging knees, rebolted keelson and keel besides numerous other fastening and stiffening, and turnbuckle rods forward.

Answer to Fourth Interrogatory. On the voyage out to Buenos Aires it was found that one of the turnbuckle rods had been put in too slack, and there was therefore a leak. This rod was removed and the holes plugged, thereby making the vessel perfectly tight. This work was done at Buenos Aires prior to loading the cargo of bones.

Answer to Fifth Interrogatory. The schooner "John Twohy" was rated by the American Bureau of Shipping under inspection of John F. Fisher on April, 1915, and classed as A1½ for a period of five years.

Answer to Sixth Interrogatory. The schooner "John Twohy" is 909 tons net register, 1020 gross register, dead weight capacity 1600 tons, 201 ft. length, 39 ft. beam, 19 ft. depth; do not know length

on water line. Schooner is of oak and yellow pine construction.

Answer to Seventh Interrogatory. The cargo was loaded in the lower hold, between decks and poop deck, there was no separation at the hatches, therefore cargo was in bulk taking the space of the entire vessel.

Answer to Eighth Interrogatory. The schooner "John Twohy" was surveyed in June, 1915, by John F. Fisher representing the American Bureau of Shipping, the schooner was repaired under his supervision and in accordance with his recommendations. We have no written report.

Answer to Ninth Interrogatory. The information requested in this interrogatory is found in the extended protest, copy of which is hereto attached and made part hereof.

Answer to Tenth Interrogatory. The schooner "John Twohy" was equipped with two 6" Worthington double acting steam pumps, and one 54"x90" boiler. The one 6" pump was located forward at engine room, the other just forward of cabin in poop deck. After vessel started to leak all the pumps were used.

Answer to Eleventh Interrogatory. In answer to this interrogatory claimants beg leave to refer to the copy of the extended protest attached to and made part of the answer to the ninth interrogatory. Claimants are unable at this time to give the location of the leak or leaks through which water came into the vessel, nor can they state fully and in detail all

changes in height of water when she began to leak until cargo was discharged at Philadelphia, as this information is peculiarly within the knowledge of the master, John Forsyth, who was master of said schooner on said voyage, and who is now acting as master of said schooner and is on a voyage from Philadelphia to Buenos Aires with cargo of spruce and white pine lumber. Claimants expect to produce Capt. Forsyth at the trial of this case or to take his deposition in advance of the trial and upon the production of Capt. Forsyth libellants will have an opportunity to get accurate information through cross-examination of Capt. Forsyth. Claimants in this connection however beg leave to refer to said extended protest from which it appears that no leak was noticed in the vessel until Oct. 31, 1915, after the vessel had encountered a heavy northeast gale of wind with heavy seas which gale continued until Oct. 31st.

Answer to Twelfth Interrogatory. The schooner "John Twohy" left Philadelphia June 18, 1915, with cargo of lumber bound for River Platte and arrived safely at Buenos Aires Sept. 3, 1915, she lay at that port about three days when she was towed to her destination at Rosario, at which port she made delivery of her cargo of lumber and the consignee paid the balance of freight due on said cargo. No report of any damage to this cargo was made to claimants by the master of said schooner or by any other person, nor was any claim for damage made upon said vessel or upon these claimants by consignees or owners of said cargo or any other person, and claimants aver that they have no knowledge of damage to said cargo.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

ALBERT D. CUMMINS, being duly sworn according to law, deposes and says that he is one of the claimants named in the foregoing libel; that he has read the interrogatories, and that the answers made there-to so far as they are made as of his own knowledge are true, and so far as stated on information received from others, he believes them to be true.

ALBERT D. CUMMINS,

Sworn to and subscribed before me this 21st day of April, A. D. 1916.

KATHERINE M. COLLINS,
Notary Public.

(Seal)
Commission expires Feb. 21st, 1919.

EXHIBIT A.

(Copy)

Official number
of vessel
76952

International Code
Signal letters
K J N R

Chartered 1862

AMERICAN BUREAU OF SHIPPING

and

AMERICAN LLOYDS

UNITED STATES OF AMERICA

CERTIFICATE OF CLASSIFICATION

No. 16470

New York April 19, 1915.

To all to whom these presents may come,

THIS CERTIFIES that the Schooner "John
Twohy" of Boston, Mass. of 909/1020 tons register

with two decks, built at Newburyport, Mass. in the year 1891 July.

Large repairs, refastened, calked all over April, 1915,

Whereof A. D. Cummins & Company are owners was duly SURVEYED at the Port of Philadelphia, April, 1915, and has been entered in the SOCIETIES REGISTER OF SHIPPING with CLASS A1½ for five years from April 1915, subject to the conditions of its rules and requirements and is deemed seaworthy to carry dry and perishable cargo and is in conformity with the highest rating known to Maritime Commerce as promulgated in the standard requirements* of this Bureau.

J. M. Proctor

Of the Classification Committee

John W. Cantillion,
Secretary

John F. Fisher,
Surveyor

(SEAL)

*This certificate is granted with the understanding that the vessel be kept in good repair and be subject to the following surveys during the term assigned, failure to comply with which renders her class herein liable to be cancelled or withdrawn.

Steel and iron vessels, first and second class to be surveyed within five years from launching and each four years thereafter, third class within four years from launching and each three years thereafter, wooden vessels subject to examination once in two years, and half time survey if granted a term of seven years or over.

The surveyor must be called whenever the sheathing is being stripped or renewed or the vessel is calked or repaired, to have same endorsed hereon.

In case of damage the vessel must be subject to a new survey.

EXHIBIT B.

MARINE PROTEST.

UNITED STATES OF AMERICA.

BY THIS PUBLIC INSTRUMENT OF PROTEST be it known and made manifest unto all whom it may concern, That on the seventh day of January in the year of our Lord one thousand nine hundred and sixteen before me, Charles S. Francis, a Notary Public for the Commonwealth of Pennsylvania, duly commissioned and sworn, residing in the City of Philadelphia, and by law authorized to administer Oaths and Affirmations, personally appeared John Forsyth, Master, F. C. Monsen, Mate, S. Forsyth, Boatswain, of and belonging to the Schooner or vessel called the "John Twohy" of the Port of Buenos Ayres of the burthen of 908 tons, or thereabouts, and they, the said Appearers, having been by me, the said Notary Public, severally duly sworn according to law, did respectively declare and say, that they sailed in their several capacities aforesaid, on the twenty-first day of October, 1915, from the Port of Buenos Ayres in and with the said vessel, she being then tight, staunch and strong, properly manned and provided with all necessary apparel, stores and provisions, and in every other respect well adapted for her intended voyage, and having on board cargo consisting of Bones, properly stowed and secured, bound for Philadelphia.

October 21st to October 29th. Moderate winds, Vessel proceeding on voyage, nothing unusual occurring.

October 30th. Fresh North East gale, with heavy

swell. Took in light sails and spanker. 6.—P. M. Reefed mizzen. Gale increasing, with heavy squalls, and nasty, confused sea. Vessel rolling and laboring heavily. At 10.—P. M. took in more sails. Vessel rolling and laboring heavily. At 2.—P. M. wind came out W. S. W. and heavy squalls. 8.—A. M. weather more moderate; made sail. Noon, partly over-cast. Wind S. W. Vessel started to leak. Pumps carefully attended.

October 31st. Comes in partly over-cast and weather clearing. At 4.—P. M. Put double reefs in mizzen, main and fore-sail. Blowing heavy—with heavy confused sea. 7.—P. M. Took in mizzen and jib and ran the vessel before the wind and sea. Decks continually full of water. Vessel rolling and laboring heavily. At 8.—P. M. shipped sea flooding cabin. Vessel rolling heavily, and leaking badly. Midnight, gale increasing, with terrific squalls. Vessel straining heavily. 2.—A. M. Gale moderating. At 6.—A. M. put vessel on her course. 8.—A. M. Made sail. Noon, fine weather. Sea going down. Pumps carefully attended.

November 1st to December 20th. Vessel proceeding on voyage. Nothing unusual occurring.

December 20th. Weather over-cast and threatening. Vessel leaking five inches per hour.

December 21st. Comes in over-cast sky and very light breeze. Moderate sea. Vessel leaking 6 ins. per hour. Over-cast sky and the breeze increasing. So ends this day. Lights carefully attended.

December 22nd. Comes in over-cast weather and strong breeze N. W. Sea increasing. Strong N. N. W. breeze. At 4.—A. M. Took in light sails and reefed the spanker. At 8.—P. M. Strong gale from N. W. Took in spanker and reefed mizzen. Vessel rolling and straining heavily. Heavy sea.

December 23rd. Comes in with over-cast weather. Very light breeze. sea going down; the vessel leaking 6 ins. per hour.

December 24th—25th. Nothing unusual occurring; vessel proceeding on voyage. Vessel leaking 6 ins. per hour.

December 26th. Comes in cloudy weather and S. S. W. breeze. 4.—P. M. weather easy with fresh South breeze. At 6.00 P. M. Wind increasing and took in top-sails and outer jib and spanker and reefed mizzen. At 8.—P. M. Wind increasing to strong S. E. gale, with heavy sea and heavy rain. At midnight, strong. S. E. Gale. Took in fore-sail; at 2 A. M. wind came out N. W. with hurricane forces. 4.—A. M. Vessel rolling and straining heavily. 8.—A. M. Gale and sea moderating. Wind and sea going down. Noon, clear weather.

December 27th. Gale moderating. Made sail. 11.—A. M. passed over Falls Light Ship. Pilot came aboard and proceeded up River to Philadelphia.

December 28th. 11.—A. M. Made fast to Morris Street Wharf.

Pumps, lights and lookouts carefully and regularly attended to throughout the entire voyage.

The Master having previously, on the 20th day of December, 1915, noted his protest in the office of Koons, Wilson & Company, #420 Sansom St. Philadelphia, Pa., where the same remains on file.

That any Losses, Injury, or Damage suffered or sustained by said Vessel or her Cargo, are entirely owing to the cause hereinbefore related, and not to any omission, neglect, or mismanagement of the said Master, his Officers or Crew.

Wherefore, these appearers, now desire to PROTEST, requiring an act thereof from me, the said Notary Public, to avail them when and where needful and necessary; and in testimony of the truth of

the premises have hereunto respectively set their hands.

(Signed) John Forsyth, Master.

(Signed) F. C. Monsen, Mate.

(Signed) S. Forsyth. Boatswain.

Whereupon I, the said Notary Public, at the request aforesaid, *have protested*, and by these presents *do protest* against the said causes and occurrences, for all and every Loss and Losses, Injuries, Damages, Costs, Charges, Breaches of Charter Party, or Bills of Lading, which have been or may be suffered or sustained thereby, that the same may be submitted unto, suffered and borne by them, to whom of right it doth shall or may belong.

Thus done and protested by me, the said Notary Public, at the City of Philadelphia, the 7th of January A. D. one thousand nine hundred and sixteen

(Signed) Charles S. Francis

Quod Attestor.

UNITED STATES OF AMERICA.

State of Pennsylvania, }
City of Philadelphia, } ss.

I, Charles S. Francis of the City of Philadelphia, a Notary Public, duly commissioned and sworn, under the authority of the Commonwealth of Pennsylvania DO HEREBY CERTIFY that the foregoing is a true copy of a certain Instrument of Protest made before me, by John Forsyth, the master of the Schooner "John Twohy" of Buenos Ayres and by him a portion of his crew duly subscribed and sworn to, the same having been carefully transcribed from and compared with the original Instrument.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal, in the City of Philadelphia, this Seventh day of January A. D. 1916.

TESTIMONY.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

T. M. DUCHE & SONS (Buenos Aires), Limited, vs. SCHOONER "JOHN TWOHY," her tackle, etcetera.	}	No. 10 of 1916. In Admiralty.
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Philadelphia, Pa., Monday, May 14, 1917, 10 A. M.

Before HON. OLIVER B. DICKINSON, J.

PRESENT:

J. THRUSTON MANNING, JR., Esq., and
WILLIAM J. CONLEN, Esq., representing the li-
bellant.
HOWARD M. LONG, Esq., representing the de-
fendant.

38 *Opening Statement on Behalf of Libellant*

(Opening statement on behalf of the libellant.)

The Court: Is it necessary to open the case?

Mr. Conlen: I do not think it is. I will tell you shortly what the case is, so that we will have it before us.

If the Court please, this is a libel filed by the owner of a certain cargo of bones that were shipped from Buenos Aires on the schooner "John Twohy," and when the bones arrived here it was found that there was a shortage. It was also found that some of the bones were damaged. A libel was filed. First the bones were unloaded, and freight was claimed, and the consignees refused to pay the freight for the full amount, and the ship owners filed a libel against the freight, and that was disposed of by agreeing as to what the amount of moisture in the bones was, and deducting that moisture from the weight, and then paying for the out-turn weight. With that the Court has nothing to do. Therefore, the libel was filed by the owner of the cargo against the schooner, and that is the libel now before the Court, claiming two things, claiming damages for shortage in the cargo, and claiming damages for the damage. The figures that are claimed, so that you will have the figures in your mind, show a net shortage of 149,069 pounds, a damage to some 389,407 pounds. That was the amount of the bones that were weighed, and they take off 16 per cent. for moisture, making 62,305 pounds, and it was agreed that the net weight was 327,102 pounds. There is damage claimed to those 327,102 pounds at \$5.70 per ton of 2,000 pounds, \$932.24.

The Court: At what rate?

Mr. Conlen: At the rate of \$5.70 per ton of 2,000 pounds. The amount claimed for short delivery in dollars and cents amounts to \$1613.14.

The Court: Let me see if I have those figures, if it is important that I have them in my mind. Let

me see if I have them in my mind. What was the shortage?

Mr. Conlen: I will hand your Honor this copy, because it is all figured out here. I will give you a copy. It is a copy of the amounts.

The Court: Do you want to state the defence?

Mr. Long: Yes, sir.

Mr. Conlen: I have not yet stated the legal basis which the Court ought to have in mind in listening to the defence, and it takes two forms. One, the intake, as presented by a clean bill of lading, that is to say, a bill of lading without any reservations as to quantities, and it shows the quantity delivered. The out-take is represented by the weights that were actually taken here. Then, we raise the legal question as to how far we have to go in showing what was loaded on the schooner, and the other question involved is the question of seaworthiness of the schooner, for damage by sea water.

40 *Opening Statement on Behalf of Defendant*

(Opening statement on behalf of the defendant.)

Mr. Long: If your Honor please, our defence here is this, that we had nothing to do with the weighing of these bones, we did not see them weighed or measured while they were at Buenos Aires, that our vessel was tight, staunch and seaworthy. Prior to taking these bones she completed a voyage of lumber to South America, and immediately prior to the voyage she underwent extensive repairs, secured a classification of A1 1-2 for five years in the American Bureau of shipping, which is a classification society, and she was allowed, under her certificate from this society, to carry dry and perishable cargoes. She made the voyage to Buenos Aires safely with the lumber and then loaded the bones there, and on the way back she encountered three severe gales of wind which resulted in the schooner straining herself and leaking. So that she leaked as much as six inches per hour, and that any damage the bones may have received was due to the peril of the sea, which is excepted by the charter party.

LIBELLANT'S EVIDENCE.

Mr. Conlen: There are certain admissions and statements in the answer. Before I go into that I suppose we should have a stipulation on the record as to the taking of the testimony. We will enter into the usual stipulation that the testimony be taken down and reduced to writing, and made a part of the record, and the costs of taking the depositions to be part of the costs of the case, copies to be furnished to each side.

If the Court please, I offer in evidence the admission in the answer on the first paragraph of the libel, that the libellants were the charterers of this schooner "John Twohy" and the owner of the cargo of bones contained in that schooner.

I offer in evidence the charter party, or a copy of the charter party, which is admitted as a correct copy in the answer filed.

(The charter party just offered in evidence is marked "Exhibit A, T. R. P.," and reads as follows):

"RIVER PLATE SAIL CHARTER PARTY

Philadelphia, Pa., July 9, 1915.

It Is This Day Mutually Agreed between A. D. Cummins & Co., owners of the U. S. Schooner 'John Twohy,' called the 'John Twohy,' classed A. 1 1-2, and to be of that class at time of loading, of the measurement of 909 tons register, or thereabouts and about 1650 English tons dead weight capacity now at sea bound to the River Plate with cargo of lumber from Philadelphia, and
Charterers.

That the said vessel being tight, staunch, strong and in every way fitted for the intended voyage, shall with all convenience be after discharge of her outward cargo proceed as directed by Charterers or their Agents to a safe berth in Buenos Aires where she can safely lie, always afloat, there to load from the Charterers or their Agents a full and complete cargo of bones; which the said charterers hereby bind themselves to ship, not exceeding what she can reasonably stow and carry under hatches, over and above her tackle, apparel, provisions and furniture. No other goods to be received on board, nor any part of the cargo to be stowed in the cabin without the Master's and Charterer's mutual consent.

The vessel being so loaded shall therewith proceed to Philadelphia, or so near thereunto as she can get, always afloat, and there deliver the cargo, in conformity with the bills of lading, on being paid freight as follows:

Six dollars (\$6.00) U. S. Gold per ton of 2240 lbs. gross weight delivered but freight to be paid on not less than 1100 tons.

Sufficient cash for the vessel's ordinary disbursements at the port of loading, not exceeding one third of the freight, to be advanced on account of same to the Master (if required by him) by the Charterers or their Agents, free of commission, but subject to a premium of 7 1-2% to cover interest and insurance, and the balance on the right and true delivery of the cargo, in cash without discount.

The vessel to be approved by Underwriters Agent before loading if required by Charterers; cost of Survey and Certificate to be at expense of Charterers.

The Master to sign bills of lading if required, at any rate of freight without prejudice to this charter, and Charterers to have the option of subletting part or whole of the vessel under their responsibility. Any difference in freight to be settled on signment of said bills of lading; if in Master's favor, in cash, less insurance, if in Charterer's favor, by Master's draft on his Consignee payable ten days after arrival of vessel at Port of discharge.

The cargo to be brought to and taken from alongside the vessel at Charterers' risk and expense.

The Stevedores for loading to be appointed by Charterers or their Agents, and paid by the Master, but at not more than current rates, say One dollar and twenty-five cents (\$1.25) Arg. Paper per ton.

Permanency, wharfage, Quay and dock dues, if

any, at Port of loading to be for account of Charterers.

The Master to apply at loading port to Charterers or their Agents, for cargo and at port of discharge of Charterers' Agent, paying two per cent. address commission.

Twenty (20) running days (Sundays and Holidays excepted) to be allowed the said Charterers for loading cargo, if the vessel be not sooner dispatched; the said days to commence twenty-four hours after the Master has given written notice, between 9 A. M., and 6 P. M. to Charterers or their Agents, that his vessel is ready for loading.

The discharge to be effected as customary at port of discharge.

Any days on demurrage over and above the said laydays at port of loading shall be paid for by the Charterers or their Agents to the vessel at the rate of four pence per net Reg. ton per day, to be paid day by day as falling due and likewise for any detention in taking delivery of cargo at port or ports of discharge.

The said laydays shall not commence to count before the vessel is ready for cargo, unless it be mutually arranged otherwise.

Time employed in taking in or out ballast or shifting ports of loading, or detention by quarantine not to count as laydays, but Vessel to be considered ready for cargo, even with stiffening ballast on board.

The owners or Master of the Vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of freight, dead freight, demurrage, average and all other charges whatsoever but Charterers' responsi-

bility to cease upon shipment of the cargo, provided same is worth the freight, dead freight, demurrage, etc. on arrival at port of discharge.

The Act of God, restraints of Princes, Rulers and People, strikes or lockouts (but not of the Charterers' or Receivers' workmen only), fire and all and every other dangers and accidents of the seas, rivers and navigations, of any nature and kind whatsoever during the said voyage, always excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, or other servants of the Ship Owners.

Average, if any, payable according to York-Antwerp Rules 1890.

Penalty for non-performance of this agreement proved damages not exceeding estimated amount of freight.

Five per cent. brokerage on the above gross freight, dead freight, and demurrage is due by the Vessel to A. D. Cummins & Company on signing the charter party, or Vessel lost or not lost, Charter cancelled or uncanceled.

Charterers have the privilege of cancelling this Charter Party if the vessel does not report for cargo by October 31st, 1915, Charterers to have the option of appointing agent to do the ship's business at B. A. at a fee of \$50 U. S. Gold.

Signed In The Presence Of

in bulk consisting of one half consumo and one half machine crushed bones."

Mr. Conlen: I also offer in evidence the bill of lading which was issued covering the cargo in question, and ask that it be marked "Exhibit B."

(The bill of lading just offered in evidence is marked "Exhibit B, T. R. P.," and reads as follows):

"T. M. Duche & Sons (Buenos Aires) LTD.,

Exporters

San Martin 362

Buenos Aires.

Shipped in apparent good order and condition by L. M. DUCHE & SONS (BUENOS AIRES) LTD. of Buenos Aires, on board the North American Schooner 'John Twohy,' whereof John Forsyth is Master for this present voyage, and now lying in the port of Buenos Aires, and bound for Philadelphia, the following goods:

A full, and complete cargo of bones weighing one million two hundred and ten thousand Kilos, marked and numbered as per margin, and to be delivered in the like order and condition at the aforesaid port of Philadelphia (all and every dangers of the seas, rivers and navigation of whatsoever nature or kind excepted, including the negligence clause) unto Order, or to his or their assigns, he or they paying freight for the said goods with all other conditions as per charter party.

Dated Philadelphia, July 9th, 1915.
and Average accustomed.

In witness whereof the Master of the said ship or vessel has signed three Bills of Lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Buenos Aires, October 16th, 1915.

John Forsyth, Master.

1,210,000 Kilos Bones.

In this quantity is included:

12,747 Kilos in 287 bags."

Mr. Conlen: The bill of lading is admitted as correct.

I offer in evidence paragraph 2 of the libel, under the admission in the answer, "That on or about July 9, 1915, the Libellants at Philadelphia, Pennsylvania, through their agents, Messrs. J. H. Cottman & Company, by a certain Charter Party of affreightment, a copy of which is hereto attached, made part hereof, and marked 'Exhibit A,' did charter from its owners, Messrs. A. D. Cummins & Company of the City of Philadelphia, the said Schooner 'John Twohy' then at sea on a voyage from Philadelphia to the River Plate, for a voyage from Buenos Aires to Philadelphia, to carry a full and complete cargo of bones."

I also offer in evidence paragraph 5 of the libel under the admission in the answer, "that the amount of 1,210,000 kilos referred to in the bill of lading is the equivalent of 2,670,345 pounds avoirdupois."

I also offer in evidence paragraph 6 of the libel, admitted in the answer, "That after loading the said cargo, the said Schooner left Buenos Aires with the said cargo on board, and proceeded on her voyage to the Port of Philadelphia, where she arrived on or about December 27, 1915, and three days thereafter, to wit, on December 30th, 1915, began discharging the said cargo."

That will fix the time.

Paragraph 7 contains an admission, "That a certain amount of the cargo of bones was wet and damaged by sea water which had leaked into the vessel during the voyage," but the exact amount so damaged is unknown. We offer that admission in paragraph 7 of the answer, for the purpose of showing that a quantity was damaged.

Paragraph 11 of the libel is offered in evidence,

as admitted in the corresponding paragraph of the answer, the fact "that the schooner was warranted by the owners to be tight, staunch, strong and in every way fitted for the intended voyage."

It is admitted that the schooner was in Philadelphia at the time the libel was filed, and the jurisdiction of the Court is admitted.

The bill of lading is admitted, and that is in evidence.

I also want to offer in evidence a portion of the separate answer of the claimants, contained in paragraph 18 of their answer, as follows:

"That said schooner left the port of Philadelphia under charter with cargo of spruce and white pine lumber, bound on a voyage to Rosario, via Buenos Aires, Argentine Republic. That after said schooner had departed on her voyage, the charter party with libellants was made and executed. While said schooner was proceeding on her voyage it was found that one of the turn buckle rods which had been put into her at the repair yard was too slack, so that after the vessel arrived at her destination and before loading libellant's cargo, it became necessary to have the rod adjusted, and it was taken out, and the hole plugged up and made tight. The vessel then loaded the cargo for libellants, and after the same had been unloaded the bill of lading (copy of which was attached to the libel) was signed by the master of the schooner, and she was prepared to proceed on her voyage back to Philadelphia."

I will offer in evidence the answers to the interrogatories, and unless the Court would like to have me call attention to what the interrogatory itself was, I will not do so. I think the answers are self-explanatory.

The answer to the first interrogatory I offer, as follows:

"The schooner 'John Twohy' was built at Newburyport, Massachusetts, by G. E. Currier in 1891. She has been steadily operated with the exception of the period from November, 1913, to February, 1915, at which time she was lying at Southport, N. C., and at Philadelphia in a wrecked condition."

The answer to the third interrogatory I offer:

"Vessel was re-treenailed bottom and top sides, all butts and wood ends re-spiked, caulked all over, eight new beams, two lock strakes in between decks, one 10 by 12 and one 12 by 12; about one-third of between decks new, 26 new hanging knees, rebolted keelson and keel besides numerous other fastening and stiffening, and turn buckle rods forward."

Then a portion of the answer to the fourth interrogatory is offered, as follows:

"On the voyage out to Buenos Aires it was found that one of the turn buckle rods had been put in too slack, and there was, therefore, a leak. This rod was removed, and the holes plugged." This work was done at Buenos Aires prior to loading the cargo of bones.

Mr. Long: I object to reading only a portion of the answer to the interrogatory.

Mr. Conlen: I leave out of that answer this statement: "Thereby making the vessel perfectly tight," because I think that is a conclusion for the Court to draw. I do not put it in. If my friend wants to offer that interrogatory, he may.

Mr. Long: I object to that. If Mr. Conlen offers an answer to an interrogatory, he must offer the

whole answer. My objection is based upon this: If Mr. Conlen wants to offer the answers to any of these interrogatories, he must offer the whole answers, and unless he offers the whole answer to this interrogatory, I object to his offer.

Mr. Conlen: I offer the admission in the answer for what bearing the Court may think it has.

I also offer the answer to the seventh interrogatory.

"The cargo was loaded in the lower hold, between decks and poop deck, there was no separation at the hatches, therefore cargo was in bulk taking the space of the entire vessel."

I also offer this portion of the answer to the twelfth interrogatory as an admission.

"The schooner 'John Twohy' left Philadelphia June 18, 1915, with cargo of lumber bound for River Platte, and arrived safely at Buenos Aires September 3, 1915. She lay at that port about three days when she was towed to her destination at Rosario, at which port she made delivery of her cargo of lumber, and the consignee paid the balance of freight due on said cargo."

I exclude from the offer, sir, this addition to the paragraph, which is:

"No report of any damage to this cargo was made to claimants by the master of said schooner, or by any other person, nor was any claim for damage made upon said vessel or upon these claimants by consignees or owners of said cargo, or any other person, and claimants aver that they have no knowledge of damage to said cargo."

Mr. Long: I object to this offer, in that the whole answer is not offered.

The Court: Have you finished with your offers?

Mr. Conlen: I think so, yes, sir.

The Court: You may enter that the offer may go of record as made, subject to the objection, to be passed upon in connection with the other questions that may arise in the case.

Mr. Conlen: I would like to have your Honor glance at this bill of lading.

The Court: I would like somebody, in the course of a case, to establish the practice as to whether we are merely taking depositions, or whether we are trying the case, and have the question of practice determined, whether we shall determine these questions as trial questions, or whether we will determine them as deposition questions.

Mr. Conlen: It makes it extremely awkward at times.

I wanted you to note the two things about the bill of lading. One is that a portion of the bones is spoken of as weighed, and a portion of it in bags. As a matter of fact, the shortage was in both the weighed and in the bags, and then, that there are no restrictions on the question of amount or weight in the bill of lading. I take it, under the cases, with that bill of lading in evidence, that we have established the weight and the amount of the bags.

There are one or two points in the charter party that I would like to call the Court's attention to so that you may have them intelligently before you. I will not bother reading more than two or three paragraphs, and not all of those. The first that is of importance is:

"That the said vessel being tight, staunch, strong, and in every way fitted for the intended voyage, shall with all convenience be after discharge of her outward cargo proceed," and so forth, "to load a full and complete cargo of bones."

The next point is:

"The cargo to be brought to and taken from alongside the vessel at charterers' risk and expense."

"The stevedores for loading to be appointed by charterers or their agents, and paid by the master."

The question will arise here as to who they were representing.

Then, there is an exception in the bill of lading:

"The act of God, restraints of Princes, Rulers and people, strikes or lockouts (but not of the charterers' or receivers' workmen only), fire, and all and every other dangers and accidents of the seas, rivers and navigations, of any nature and kind whatsoever, during the said voyage, always excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owners."

Then there is the provision for average, according to the York-Antwerp rules.

I will call Mr. Lyons to show the out-turn weight.

MICHAEL LYONS, having been duly sworn, was examined and testified as follows:

By Mr. Conlen:

Q. What is your full name?

A. Michael A. Lyons.

Q. And where do you live?

A. No. 16 North Dearborn Street.

Q. Philadelphia?

A. Yes, sir, West Philadelphia.

Q. Your business is what?

A. Clerk.

Q. Did you have to do with the weighing of the bones on the schooner "John Twohy" in December, 1915?

A. Check weighed them, sir.

Q. You check weighed them?

A. Yes, sir.

Q. How was that done?

A. We light weighed the tubs according to the number. There were four, I believe, if I remember rightly. Then deducted that, according to the ten drafts, from the total of ten drafts, the gross weight, and that made up the difference.

Q. You kept an account, did you, at the time?

A. Yes, sir.

Q. (Book shown witness.) Is that the book in which you made your entries?

A. Yes, sir.

Mr. Long: Did he make the entries himself?

By Mr. Conlen:

Q. You made the entries in that book?

A. I made the entries in here, yes, sir.

By Mr. Long:

Q. At the time you weighed the bones?

A. Yes, sir, at the time I weighed the bones.

By Mr. Conlen:

Q. Compare your net totals with those figures, and say whether or not they are correct.

The Court: Is there any controversy over this branch of the case?

Mr. Long: I do not know. We do not know anything about these weights.

By Mr. Conlen:

Q. Will you compare it with this statement of the amount? There is a tabulated statement. Here is a detailed statement, too, that I will show you.

A. Yes, sir. That is right. That is it. That is a summary of the whole cargo. We light weighed the tubs in the morning. We used four tubs.

Q. You say you light weighed the tubs in the morning?

A. Yes, sir. No. 1 was 566. No. 1 weighed 566 light. No. 2 weighed 545 light. No. 3 weighed 545 light.

Q. Do not give us which one but tell us your method, without giving each one.

A. Then, we had ten of those. We have them separated, 4, 3, 4, 4, 3, 2, 1, whatever it would be, whatever tub came up, we weighed it. Then, in every ten drafts, we deducted the gross weight, or we deducted the net weight from the gross, or the

number of tubs. Say it was ten, it was ten drafts to each. Say it was 557. That would be 5570, ten drafts.

Q. Every tub was weighed heavy?

A. Yes, sir.

Q. And every tub was weighed light?

A. Yes, every tub. We light weighed them.

Q. So that by deducting the sum of the ten light tubs from the ten heavy tubs, you arrived at the quantity of bones taken out of the hold?

A. Yes, sir, the net weight.

Q. Are those figures that I show you there tabulated a correct statement of the weights of the tubs?

A. Yes, sir, as it is given here.

Mr. Conlen: I offer that statement in evidence. Also the tabulated statement. I will offer both statements, one being tabulated from the other.

Mr. Long: What is the history of this statement? Who made it?

Mr. Conlen: He says they are correct. He compared them. They were made up from his books. Here are his books.

The Court: What is the use of spending time over this branch of the case?

Mr. Long: I want to see the figures, if your Honor please. That is all.

The Court: I understand. Admiralty lawyers and patent lawyers who are trained to take depositions long in advance of the trial of their cases put in everything because you do not know where the

pinch of the case will come. But now you are trying the case, and you will have to try it like you would try a jury case, and come right down to the controverted features of it.

Mr. Long: Yes, sir. But this is an important feature of this case, because they are now trying to show their loss, to show the amount which was not delivered.

The Court: I understand that. This witness took certain weights.

Mr. Long: Yes, sir.

The Court: And he kept a record of them. He first took, as I understand it, the weight of the tubs, the empty tubs, and then at intervals of every ten, the aggregate weight of the tubs was deducted from the gross weight of what was taken out.

The Witness: Yes, sir.

The Court: That gave him the weight of the bones.

The Witness: Yes, sir.

The Court: And he has it there. If you want to go over each item, if you want him to swear to each item, he can do it, but is there any occasion for it?

Mr. Long: I am not asking him to do that.

By the Court:

Q. Is that the situation as I outlined it? Was that your system?

A. Yes, sir. You can see it right here.

Q. What I stated. Was that the way you did it?

A. Yes, sir. You can see it right here.

By Mr. Conlen:

Q. This tabulation was made from that book of original entry, was it not?

A. Yes, sir, and certified here. This is Mr. Davis right here.

Q. It was certified to as correct, the weight?

A. Yes, sir.

Q. Looking at that, and refreshing your recollection, and comparing it with your book, say whether or not the figures on that tabulation are correct?

A. Yes.

Q. Look at them now, and the figures in your book, and say whether or not those are correct?

A. It agrees with the certified weight.

Q. It agrees with the certified weight?

A. Yes, sir.

Q. Your books, after comparing this tabulation with them, agree with the tabulation, and it is certified here?

A. Yes, sir.

Mr. Conlen: I offer that tabulation in evidence again.

The Court: Is it objected to?

Mr. Long: No, sir.

The Court: If it is not objected to, it is admitted.

Mr. Conlen: Do you object to the completer tabulation?

Mr. Long: You have one in. Why do you want more?

Mr. Conlen: All right.

(The tabulation just offered in evidence is marked "Exhibit C, T. R. P.," and reads as follows):

"Jos. L. Davis & Co.,
Weighers and Gaugers,
149 South Front Street,

Philadelphia, Dec. 30th, 1915,
Jany 15th, 1916.

Return of Cargo Bones 'John Twohy'

Weighed for Messrs. T. M. Duche & Sons.

3416 Tubs Sound	2,173,870 lbs.
241 Bags Sound	20,304 lbs.
532 Tubs Wet	389,407 lbs.

Total weight

2,583,581 lbs.

Jos. L. Davis & Co.
John W. Davis."

By Mr. Conlen:

Q. Look at that tabulation again and say how many pounds of the bones were wet, and how many were not wet?

A. 389,407 pounds wet.

Q. 389,407 wet?

A. Yes, sir.

Q. Pounds?

A. Yes, sir.

Q. They were wet?

A. Yes, sir.

Q. How many were not wet?

A. 2,173,870 pounds. That is the dry stuff, and the bags, of course, that is separate.

Q. How many bags were there?

A. There were 241 bags, sound stuff.

Q. How many pounds?

A. 20,304 pounds. The total weight taken out of the vessel was 2,583,581 pounds, according to my weights.

Q. Does that represent all of the bags that were taken out of the vessel?

A. As far as I know, sir. That is as far as I know, sir.

Cross-examined.

By Mr. Long:

Q. Were you present when that cargo was being discharged?

A. Yes, sir.

Q. Where were you?

A. On deck.

Q. On the deck of the vessel?

A. Yes, sir.

Q. And the method of discharging was to load it into the tubs?

A. Yes, sir.

Q. What was done with the bones after they were taken from the vessel?

A. They were taken up on the dock, to the house, some of them. Some of them were taken up there. I really don't know. All I wanted to know was that they got measured. I was delivering the cargo there.

Q. But some of them were left piled on the wharf, and others were taken up to the house?

A. I could not say as to that.

Q. How long were you discharging this vessel?

A. I don't just remember. The book will tell you.

Q. Tell us how many days you were doing it?

A. December 30, 1915, seems to be the first. I don't just remember that now, it has been so long ago. December 30, 1915, I believe was the first date, and it lasted until 1-15-1916.

Q. Were you about 16 days, then, discharging?

A. Yes, sir, about that.

Mr. Conlen: This is not proper cross-examination, if the Court please. If my friend means to examine this witness along this line, let him do it in his defence. If he wants to put this in as a defence in any way, let him call him in defence.

The Court: If you are going into the question of the correctness of the length of time it took, it would be germane to go into it, but is there any controveray of that kind?

Mr. Long: They have all the measurements. We have none.

The Court: I assume you have studied your case, and you know where the pinches would come. Of course, it may come in in the accuracy of this weighing. That is a place in which it may come. After it was received, *prima facie*, it had a certain weight, but it is only *prima facie*.

Mr. Long: That is just it. Our defence is that we delivered every bit of bones which was put on

our ship. We did not weigh them before they were put on, and we did not weigh them afterwards.

The Court: If that is your defence, of what avail is it to go into the correctness of this weight? You delivered all you had. Any discrepancy in the weight will be shown by an error either at the receiving end or at the discharging end. It would not matter to you except as to your freight, and that is not in controversy here. It would not matter to you where the mistake was made.

Mr. Long: Very well. I have no farther questions.

Re-direct examination.

By Mr. Conlen:

Q. One question. You were acting for Davis & Company, the official weighers of this cargo, were you not?

A. Yes, sir.

Q. What connection did they have with Baugh & Sons?

A. None that I know of.

Q. They are official weighers at the port of Philadelphia, are they not?

A. Yes, sir. They have their own men.

Re-cross examination.

By Mr. Long:

Q. They were employed by Baugh, were they not?

A. Davis!

Q. To make this weighing?

A. It don't matter to me who they are employed by. I had to get what was coming out of the ship. That is all.

Q. I did not ask you that. I said, these official weighers were employed at Baugh's wharf.

The Court: Is there any statutory provision making a certificate from certified weighers evidential?

Mr. Long: No, sir.

GEORGE STOEHR, having been duly sworn, was examined and testified as follows:

By Mr. Conlen:

Q. What is your business?

A. Assistant in the laboratory, assistant to the chemist.

Q. In what laboratory?

A. The Fertilizer Department, Baugh & Sons.

Q. You live where?

A. 1839 South Front Street, Philadelphia.

Q. What did you have to do, if anything, with the cargo of bones out of the schooner "Twohy"?

A. I made the moisture determination, and the total phosphoric acid and ammonia determinations.

Q. And did you make that determination with regard to the whole cargo, or with regard only to a portion of it?

A. We made two representative tests here as regards —

Q. Answer the question I have asked you. Did you make your different tests with regard to the whole of the cargo or with regard only to a portion of it?

A. As far as I know, the whole of the cargo.

Q. What were your tests?

A. A sample of bone meal was submitted, the moisture test of which was 13.40 per cent.

Total phosphoric acid, 18.46, calculated to phosphate or lime, 40.34, and the ammonia determination was 3.93 per cent. That was the bone meal made from this bone.

Q. That is one test, is it?

A. Yes, sir.

By Mr. Long:

Q. Bone meal?

A. Bone meal, made from the rough wet bone, from the schooner "John Twohy."

By Mr. Conlen:

Q. What other tests did you make?

A. This one is cracked bone, made from rough wet bone from the schooner "John Twohy." The moisture determination was 11.00 flat. Total phosphoric acid, 21.74. Bone phosphate, or phosphate of lime, 47.50. Ammonia, 4.26.

Q. What other tests did you make?

A. Those are the only tests I made.

Q. What was the moisture in the first test?

A. The first one I read was 13.40.

Q. 13.40 of moisture?

A. Yes, sir.

Q. Is that a large or a small quantity of moisture to receive out of a cargo of bone?

Mr. Long: I object to that.

The Court: What is the objection, that he has not shown familiarity with it?

Mr. Long: Yes, sir.

The Court: You will have to develop that, if it is necessary.

By Mr. Conlen:

Q. How long have you been working for Baugh's as a chemist?

Mr. Long: Is this man a chemist?

Mr. Conlen: He testified he was a chemist and worked for Baugh & Sons.

The Court: It would not follow, from the fact that he was a chemist, that he knew the ordinary conditions of cargoes of this kind.

By Mr. Conlen:

Q. How long have you been with Baugh & Sons?

A. I have been in the laboratory for four years and a half.

Q. Have you had to do with cargoes of bones?

A. I have had to do with bones of all descriptions.

Q. For four years and a half?

A. Yes, sir.

Q. You have made tests, then, for moisture in bones, have you?

A. Yes, sir.

Q. And you are familiar, therefore, with what the chemical constituents of the bones are?

A. Yes, sir.

Q. You are familiar with the amount of moisture that is usually contained in bones?

A. Yes, sir.

Q. Are you familiar with the amount of moisture that is usually contained in bones that come from Buenos Aires?

A. I simply take it as so much moisture in these bones, whether —

Q. What is the ordinary quantity of moisture that is in bones?

A. About 6, 6 1-2 and possibly 8 per cent.

Q. Possibly 8 per cent. If you encounter more than 8 per cent. moisture in bones, do you call that an extraordinary amount of moisture?

A. Yes, sir.

Q. No doubt about that?

A. No doubt.

Q. And the amount of moisture in the two tests you have given us in one case was 13.40 and in the other case 11.00 per cent.?

A. Yes. May I offer an explanation?

By Mr. Long:

Q. Surely. Go ahead.

A. I was informed just after these were reported that they made another test of 100 pounds.

Q. You were informed?

A. Yes. They made a test of a quantity of 100 pounds, to get an idea from the large quantity direct from the scales, instead of bringing that amount to the laboratory. This test went to 24 per cent.

By Mr. Conlen:

Q. 24 per cent.?

A. Yes.

By Mr. Long:

Q. Did you have anything to do with making that test?

A. No.

Mr. Long: I move to have that stricken from the record.

Mr. Conlen: You were the man who said he might go ahead and make the explanation.

Mr. Long: I did not suppose he was going to tell us what somebody told him.

Mr. Conlen: You cannot tell him to go ahead, and then object to his answer.

Mr. Long: It is of no value.

The Court: It is of no value to us. Let it be stricken out.

By the Court:

Q. If I understand you correctly, you say that somebody told you of a result of a test that was made by somebody else. Is that right?

A. Yes, sir.

(Motion to strike out granted.)

By Mr. Conlen:

Q. Did you have anything to do with the settlement of the amount of moisture in these bones, between the parties?

A. Not with the settlement, no, sir.

Q. I mean to say, did you have anything to do with making up the figures as to what the amount of moisture was in the bones?

A. Yes, sir.

Mr. Long: What is the purpose of this?

Mr. Conlen: My purpose is to qualify him to testify. If he had to do with the figures, he would know it.

The Witness: I made a test, and recorded that on the record, the laboratory record.

By Mr. Conlen:

Q. But you did not have to do with compiling the figures upon which the settlement was based between the parties as to the amount of moisture?

A. No, sir.

Q. Let us have your analysis of the ammonia in

your two tests. One of them is 4.26. What was the other amount of ammonia?

A. 3.93.

Q. 3.93?

A. Yes, sir.

The Court: I wish you would explain to me what bearing ammonia has on it.

Mr. Conlen: I am going to bring that out.

By Mr. Conlen:

Q. What bearing has that amount of ammonia on this question here as to the quality of the bones or the damage by moisture?

A. A good quality of bones would go much higher than that in ammonia, yield much more ammonia.

Q. How much more ammonia would they have?

A. I expect over three-quarters of a per cent., as they generally go five and over.

Q. How much?

A. Over three-quarters.

Q. Three-quarters of one per cent., more than this.

By the Court:

Q. This cargo, is it in the form of ground bone?

A. No, the gross weight is upon the cracked bone.

Q. Cracked bone?

A. Yes, sir.

Q. Assume as a fact that you have two lots, one of which has been subjected to the sea water, and the other of which has not. Would that vary the quantity of ammonia that you would find upon the analysis of the two quantities?

A. I have never had to do with that kind of a question.

Q. Do you understand the question? It is really the same question your counsel asked you. I want to get that clearly. Supposing you have a sack of this crushed bone there (indicating) and another sack here (indicating), and you were told that one had been washed by the sea water, and the other had been made dry?

A. Yes, sir.

Q. What would you expect, in the two different experiences through which those two sacks of crushed bone had gone, would be reflected in the relative quantity of ammonia which upon analysis you would find to be in each one?

A. I would expect to find more ammonia in that which had been kept dry.

Q. And that would ordinarily, you think, vary to the extent of three-quarters of one per cent.?

A. Yes, I would think so.

By Mr. Conlen:

Q. What is the value of ammonia in bones?

A. Explain that.

Q. What is the value of ammonia? You are talking about the quantity of ammonia. Why do you want a large quantity of ammonia in bones?

A. Well, in good bones we look for ammonia, the ammonia content, nitrogen, which is used as plant food.

Q. Am I correct in saying that the ammonia in the bone is the fertilizing principle that makes the bone valuable for fertilizer?

A. Yes, sir.

Q. Is there any other chemical constituent that

you have noted there that has a value that was deficient?

A. Yes, the total phosphoric acid, and the phosphate of lime.

Q. Tell us about the phosphoric acid. What the percentage was in each test.

A. The total phosphoric acid was 21.74, calculated phosphate of lime, 47.50. That is below what we expect in good bone.

Q. How much below?

A. The phosphoric acid is fully 6 1-2 per cent., or about that.

Q. 6 1-2?

A. 6 1-2.

The Court: That does not impress me as worth anything, if I caught the theory of the defence in this case. We are only concerned here to the extent to which it was deteriorated by sea water, are we not?

Mr. Conlen: Yes, sir; that is the fact.

By Mr. Conlen:

Q. Will sea water affect the phosphoric acid content or the lime content in bone?

A. Yes, it dissolves it to a certain extent.

Q. What did you have to do with this bone in order to make it up to the standard of good bone?

A. If we sold it as bone meal, we would have to add some ingredient that is used altogether for this ammonia content, which is very high in ammonia. For instance, if they used sulphate of ammonia, which goes about 25 per cent., and added it to this, that would bring the total of the mixture up to that

point. There are other things they could use, nitrate of soda.

Q. When you say these bones were cracked bones, give the Court some idea just how large the bones were?

A. They were various sizes, pieces, about the size of say a small finger nail, a kernel of corn, and smaller. They are down to very small pieces, and they would break just by the process of abrasion, piece against piece.

Q. So that when you speak of meal, you speak of very, very fine ground bone, and some of this bone was fine bone, was it not?

A. Yes, sir.

Cross-examined.

By Mr. Long:

Q. Did you make up those figures, those that you have there?

A. Yes, sir.

Q. You were assistant to the chemist down there?

A. Yes, sir.

Q. You are a graduate chemist, are you?

A. Yes, a graduate from the Drexel Institute.

Q. When?

A. Three years ago, about three years ago.

Q. Have you worked as a chemist for any other company than Baugh?

A. No.

Q. Did you make the tests of these bones yourself, or were they made by your superior?

A. I made them myself.

Q. You made them yourself?

A. Yes, sir.

Q. Those bones were brought to you in your laboratory, were they?

A. Yes.

Q. You were told they were from the schooner "John Twohy"?

A. Yes.

Q. You yourself did not know where they came from?

A. I took the data from the ticket that accompanied the can, that they were brought in.

Q. What is that?

A. I took the data from the ticket that accompanied the receptacle that they were brought in.

Q. Of your own knowledge, you did not know whether they were from the "John Twohy" or not—of your own knowledge?

A. No, I did not bring them in.

The Court: Is there any question of a substituted sample of bone?

Mr. Conlen: They settled on these very tests.

Mr. Long: No, sir.

Mr. Conlen: They settled on these very tests.

Mr. Long: We filed a libel for freight here.

The Court: They settled as to the rate of freight. That might be a very different question.

Mr. Long: Yes, sir.

Mr. Conlen: The weight was based on the chemist's report.

The Court: If there is any real question as to the integrity of the samples submitted to this witness for analysis,—he does not know where they came from, so, of course, it is short, technical proof, but if there is no controversy over it, what is the use of raising that question?

Mr. Coulen: Do you make a question of that, Mr. Long?

Mr. Long: We will not make a point of that, your Honor.

By Mr. Long:

Q. Could you determine from your tests of these bones whether or not they had been wet by fresh or salt water?

A. Yes, I could.

Q. Did you?

A. No.

Q. Why didn't you?

A. Well, I had no instructions, and simply I did not see that that question would be put.

HARRY C. BURRICHTER, having been duly sworn,
was examined and testified as follows:

By Mr. Conlen:

Q. Where do you live?

A. 711 South 68th Street, Philadelphia.

Q. You are connected with Baugh & Sons?

A. Yes, sir.

Q. In what capacity?

A. Assistant to the treasurer.

Q. Did you have to do with the cargo of bones
that came out of the schooner "John Twohy"?

A. Yes, I oversaw the settlement of it.

Q. You oversaw what?

A. The general handling of the cargo that had
been reported damaged and the settlement with the
owners of the cargo. Did you see the cargo itself,
or any portion of it?

A. Yes, I saw the cargo several times.

Q. Where did you see it?

A. At our wharf, discharging at the Morris Street
Wharf.

Q. You saw it coming out of the ship, did you?

A. Yes, sir.

Q. Did you see it in the ship?

A. I saw it when the hatches were first taken off,
but not afterwards.

Q. When the hatches were first taken off, what did
you see?

A. I do not know that there was anything unusual
when the hatches were first removed.

Q. Why did you go down to see the hatches removed?

A. Because the captain, I believe, had filed a protest, and had reported that there was water in the hold of the cargo, of the ship, and that always means that the bones are going to be wet, and we immediately notified the owners of the cargo, then, that there is going to be a dispute.

Q. Did the captain tell you that there was water in the hold?

A. He told the superintendent of the plant that he had taken in water.

Q. There was no question raised by anybody but that the bones had been wet?

A. Oh, no. No question.

Q. You saw the cargo. Did you see the portion of the cargo that was dry?

A. Yes.

Q. Will you describe that to us? Did it consist of loose bones or did it consist of bags?

A. The part I saw was loose, but there were some bags in the hold.

Q. Bags of bone?

A. Yes, sir, about 241 bags.

Q. Those bags did not contain dry or crushed bones, or did they?

A. As it was stated before, the cargo consisted of cracked bone. It should be called crushed bone. There is always a portion of small pieces in a cargo, caused by friction, but the greater part of the cargo consisted of pieces of bone about maybe the size of one finger, or the size of your hand.

Q. Some of the bones were packed in bags, and some were packed loose?

A. Yes, the greater part loose.

Q. The greater part was loose. Were there any bulkheads or compartments in the schooner?

A. I could not testify accurately to that, but apparently not.

Q. You saw the wet portion of the cargo, did you?

A. Yes, sir.

Q. Will you describe that portion of the cargo?

A. Those bones were removed from the hold when we reached down close to the skin of the vessel, down near the keel, and we had notified the owners of the cargo that they were being taken out wet. We were instructed to put those aside. We had piled them in a distinct pile from the sound portion, and they were very dirty, very dark, and wet with water, soaked, and with an oily substance which had come out of the keel, and those bones were a very unsatisfactory portion of the cargo.

Q. Let me understand this clearly. The good bones were on top?

A. Yes.

Q. They were taken out and put on a pile near your wharf?

A. Yes.

Q. And the bones that were wet were taken out of the vessel and put in another pile on your wharf?

A. Yes, sir.

Q. And there they remained, I take it, until the controversy as to paying for that part of the bones was settled?

A. That is right.

By the Court:

Q. In what form were the wet bones? Were they loose, or in bags, or both, or one or the other?

A. As I recall it, the bones in the bags were dry.

I do not think there was any dispute about the bones in the bags.

By Mr. Conlen:

Q. Were all of the bags of bones there that the bill of lading called for?

A. Yes, I think they were all there, 241 bags is here. I believe they were all delivered.

Q. Let us look at the bill of lading, and that will refresh your recollection.

Mr. Long: This is your witness.

Mr. Conlen: This is my witness. I am not forgetting that.

The Court: 287 bags.

By Mr. Conlen: •

Q. Will you look at the bill of lading, and refresh your recollection on that point?

A. 287 bags called for by the bill of lading. There were 241 bags delivered in the out-turn.

Q. I want to have that clear. Your recollection is that all of the 241 bags were not damaged by the sea water?

A. I can confirm that in one moment.

Q. Is that correct?

A. Yes, they were sound. Apparently, from the reports, there was no complaint. They were paid for in full.

Q. What was done with the bones that were damaged when they were put out there on the wharf?

A. They were just set aside in a pile, removed from the sound portion of the cargo.

Q. Did you take any steps toward making tests or finding out the condition of the bones?

A. After the owners of the cargo instructed us to proceed to find out what they were worth, tests were made in various ways. The first step was that we notified the owners of the cargo that we did not want them, and instructed them to sell those bones, as we were not obligated to take them under the contract. They looked around, of course, and found no buyer. They came back to us and asked us to put a value on them. We then made the tests as described by the chemist, which are known as chemical tests in the laboratory. There is also a mechanical test made. Under the instructions of the treasurer and myself the superintendent took I judge about a ton of bones and put them in an open warehouse. Then, after they had been exposed to the air, but not the weather, for about two days, they were weighed again, then the portion that had gone off was generally agreed as being excess moisture. That was shown to be 24 per cent. loss there.

Q. 24 per cent.?

A. Yes, sir.

Q. Did you get the amount in pounds of the moisture? I show you this tabulation.

By the Court:

Q. Tell me this, do bones absorb moisture?

A. If they are exposed to constant weather, they will. If they are just put in the open, whether the weather —

Q. I am talking about absorbing moisture as distinguished from soaking them in water?

A. Yes, they will absorb a little moisture, but they will become soaked if they lay in the water as

these bones did. They will absorb moisture then like a sponge if they are soaked constantly in water.

By Mr. Conlen:

Q. Will you look at this tabulation, and tell me how many pounds of bones were wet, and how many pounds were allowed for moisture?

A. We had 389,407 pounds set aside as being wet, damaged, as we call it, and an allowance was made of 16 per cent. That was agreed upon by the owners of the cargo and ourselves as being a fair determination of the excess moisture.

Q. What did that amount to in pounds?

A. That was equivalent to 62,305 pounds.

Q. So that when that allowance for excess moisture was taken off, what was the total amount in pounds of bones that you received and paid for?

A. With the allowance off?

Q. Yes. Just give it from that tabulation there.

A. 2,194,174 pounds of dry bones were settled for

By the Court:

Q. Let me check that up. 2,194,174. Is that right?

A. Yes, sir.

By Mr. Conlen:

Q. Now, at what price per ton were those bones settled for per ton of 2,000 pounds?

A. The sound portion?

Q. The sound portion and the unsound.

A. The sound portion was settled for at the contract price, \$27.00 per ton, per ton of 2,000 pounds, delivered at our wharf.

Q. The unsound portion, what per ton?

A. The unsound portion, a deduction of \$5.70 was taken from the \$27.00 after the moisture had been deducted, and the settlement was made on 327,102 pounds, at \$21.30 per ton of 2,000 pounds.

Q. And that amounted to how much in money?

A. I do not think I can tell you that from my figures.

Q. Look at this statement and see.

The Court: That is a mere matter of mathematics. Just state it to him.

A. That is right. \$932.24.

The Court: That is not quite responsive to the question you asked him. Did you mean the \$932.24 is the \$5.70 per ton deduction for the whole number of pounds?

Mr. Conlen: Yes.

The Witness: On the sound basis, with the damaged bones removed, that is the amount we paid for the bones after they were put on a sound basis.

The Court: I do not understand that.

By the Court:

Q. The shortage price was \$5.70 per ton, was it not?

A. Yes, sir.

Q. And the figure \$932.24 is the shortage figure?

A. Yes, sir, exactly. That is the amount of the deduction. We settled differently, but that is correct.

By Mr. Conlen :

Q. What is the market price of the bones? How do you get at the market price of good bones?

A. Of this particular portion?

Q. Yes.

A. There was no question, because the contract had been made, of course, weeks and months in advance, prior to the arrival of the vessel. That was settled.

Q. What was the market for damaged bones?

A. There practically is no market outside of ourselves. I presume we are the largest buyers of bones, and the owners of the cargo requested us to find a buyer, and did not care to avail themselves of the privilege, preferring to deal with us, putting the bones on a sound basis.

Q. So that an allowance was made, and that allowance resulted in a market value of that portion of the bones that was damaged?

A. Yes, that was the market value of them.

Q. At that time?

A. At that time.

Q. You are familiar, of course, with what the market price was at that time?

A. Yes, sir.

Q. What was necessary to be done for these bones to make them saleable?

A. There were four or five different expenses. The first one was the expense in connection with the handling of these bones because they had been separated from the sound portion. That meant carting and handling to a separate pile. The bones had to be dried out before they could be used. They were very dirty and wet. They could not be used in the mill by themselves. The chemist explained that they

were deficient in ammonia and phosphoric acid. In order to make them available to use, it was necessary to buy high-priced material, which runs very high in nitrogen, or ammonia, which is the trade term, and combine it with the bones. Also it was necessary to use a small percentage in the grinding of the wet bones with a good portion of the sound bones. You cannot grind wet bones. They will give a bone meal which results very dark in appearance. They were dirty. We cannot sell dark bone meal. It is necessary to put it in with the whiter, cleaner bones, making the resultant bone meal lighter in color.

Q. Are you familiar with cargoes of bones? Have you seen other cargoes of bones coming to your place?

A. Yes, sir.

Q. What is the condition generally speaking of cargoes of bones that come there?

A. The appearance?

Q. Yes.

A. They are clear in appearance. They are free of foreign material, lighter in color than these dirty bones were, and they are dry, very dry.

Q. When you say "very dry," what do you mean?

The Court: Bone dry.

A. You hear "bone dry." That is how dry they should be.

By Mr. Conlen:

Q. Bone dry?

A. Yes.

Q. I would like to get another thought before the Court. Are they dusty?

A. Yes, there is quite a large portion of dust risen when the buckets are dumped into the hopper. The dust flies away, caused by the constant breaking of the bones and the friction in the vessel.

Q. Did you describe the appearance of this damaged cargo to the Court?

A. I think I called them dark, dirty bones, very wet, and covered with mud and slime, coated from the bottom of the vessel.

Q. The Court asked you the question about the power of bones to absorb moisture, the absorption of bones as compared with water-soaked bones. What would be the difference with regard to bones, for instance, that might be on the wharf, and rained upon, as opposed to bones that were in the hold of a ship and subjected to sea water?

A. We store a great many bones on our wharf. They are piled up in conical shapes, in conical piers. The result is that the rain never settles on them, it runs off, and only the outer coat, perhaps a few inches, ever gets wet. That causes those, perhaps, to bleach, in time, if they are very long there, and the constant wetting makes the bones bleach, but it does not destroy their value, because they never become rain soaked, and they do not become coated with anything foreign.

Q. Does your experience differ in any respect to sea water in that regard?

A. The general understanding is that sea water has a worse effect on bones than fresh water.

By the Court:

Q. Would that mean ordinary sea water, or sea water that is mixed in with bilge water?

A. The very sea water itself would harm bones, yes, sir.

By Mr. Conlen :

Q. Do you know how high the point of moisture was from the bottom of the ship in these bones?

A. It was variously from several feet to four feet, perhaps three or four feet on the average of water in the hold.

Q. Did you see the inside of the vessel after she arrived at port?

A. No, sir, I did not see the inside of the vessel.

Q. Do you know whether or not she was laying in port?

A. Only from the statement of the captain and others who had come in contact with her.

Q. What did the captain say about her?

A. He said she had been taking in water practically the whole part of the trip, as I recall it.

Q. Did he say she took in any water in port? That is my question.

A. No, I cannot say he said that.

Q. You do not know whether or not she was leaking in port, do you?

A. No, I do not.

Q. Did he tell you where she was taking in the water?

A. No, he did not tell me where she was leaking.

Q. You understood she was leaking?

A. I understood she was leaking.

Mr. Long: His understanding is not evidence.

By Mr. Conlen :

Q. But the moisture, at any rate, was down in the bottom of the ship?

A. Yes, sir.

By the Court:

Q. Is there any appreciable diminution in the weight of a cargo of bones from these dust clouds of which you spoke?

A. It is comparatively small. It only comes when the bucket is dumped into the hopper. It amounts to very little in the total.

By Mr. Conlen:

Q. Let me cover that point. Was the shortage of this cargo usual or unusual?

A. In consideration of the moisture it was—I would put it this way, it was an unusual shortage.

By the Court:

Q. What would these bags weigh, if you know?

A. No, your Honor, I could not say. That could be averaged very quickly.

By Mr. Conlen:

Q. Would this book show it? Would this book show the bag weight?

A. I will see if I can find it.

The Court: If anybody knows, tell me. I want to know as a matter of information.

Mr. Conlen: I suppose we have a record of that. I think we ought to have it.

Mr. Long: Captain, do you know the weight of a bag?

The Captain: They were all different sizes, the bags.

Mr. Manning: According to this bill of lading, 287 bags weighed 28,131 pounds. Average weight 98 pounds per bag.

The Court: 100 pounds.

Mr. Manning: The out-turn weight of 240 bags weighed 20,304 pounds, or 84 1-2 pounds to the bag.

Mr. Long: 14 pounds to the bag.

Mr. Conlen: 98 pounds for the intake, and 84 1-2 on the out-turn.

Mr. Long: 14 pounds.

By Mr. Long:

Q. That is a difference of 14 pounds between the intake weight and the out-turn weight?

A. Yes, sir.

The Court: What did you say the intake weight was?

Mr. Manning: 287 bags.

The Court: And the taking out weight was 240, was it?

Mr. Manning: 20,304 pounds, or an average of 84 1-2 pounds to the bag.

The Court: And the other was 28,000 and something, was it?

Mr. Conlen: 28,131 pounds.

Mr. Manning: 12,747 kilos it was, or 28,131 pounds.

Cross-examined.

By Mr. Long:

Q. You saw this cargo when it first arrived, did you?

A. Yes, sir.

Q. You were there when the hatches were taken off?

A. Not immediately, but shortly after that.

Q. The same day, I suppose?

A. Practically the same day, before anything was done.

Q. Where were these bags stowed? What portion of the vessel?

A. I could not say. I did not see the bags come out at all.

Q. You did not see that?

A. No, sir.

Q. The bones you did see were all stowed right even with the hatches, the hatch combings?

A. Yes, very close to the top of the hatches.

Q. The tops of them were dry, and it was not until you got down toward the skin of the vessel that you found the wet bones?

A. That is right.

By the Court:

Q. How were these bags fastened? Were they sewed?

A. Yes, just roughly sewed.

Q. Of the 240 bags that were delivered, did they show any evidence of having been opened up, or anything of that kind?

A. No, there was no question brought up whatever about that.

Q. There was nothing in their appearance to indicate that they had been opened?

A. No, I think not.

By Mr. Long:

Q. You have had considerable experience with these cargoes from Buenos Aires, have you not?

A. Yes, over a number of years.

Q. There is always a discrepancy between the intake and the out-turn weight?

A. Yes, there is generally some shortage.

Q. Some shortage?

A. Yes.

Q. And to what do you ascribe that?

A. It has never been accurately learned why that occurs. Either the weighing at Buenos Aires is not accurate, or there is a loss in the voyage, which is natural, or there may be some other reason, but the shippers understand there will be some loss.

The Court: Is not the reason that the intake weight is the seller's weight, and the out-turn weight is the buyer's weight?

Mr. Long: It is not altogether that. I think he said there was a natural loss.

The Witness: I would like to say that the intake weight is not the buyer's weight. It is the duty of the weighers here engaged by the owner of the cargo —

The Court: I mean it is checked up.

By the Court:

Q. You make sure that you get your weight?

A. Oh, yes.

By Mr. Long:

Q. What is this natural loss that you refer to?

A. I could not say that there is any reason for that. I have talked to various parties who handle cargoes, and they say it is just general, in a general way —

Q. Is it due to the drying out of the bones?

A. It would hardly be due to that, because the bones are dry when they are put in, there is very little moisture in them, but the crushing of the bones in the vessel, breaking them up, might cause a small loss.

Q. Some of those bones that were put into this cargo were bones that had been gotten out on the campos which are very thoroughly dried?

A. Yes, sir.

Q. Then these bones that are gathered up around the City of Buenos Aires, they are what you call wet bones, are they not?

A. No. I will just explain briefly that there are two classes of bones, what are known as the campo, coming from the camps or the fields, and what are known as the consumo, coming from the kitchen, the

consumers. The bones coming from the fields are very dry, coming out from the plains, they have had a chance to dry out, and the consumo bones coming from the kitchen are somewhat greasy, containing more or less grease, not a great deal.

Q. These bones lying out on this campus for any length of time, don't they lose some of their constituent parts, such as the ammonia?

A. No, they do not lose any to any great extent.

Mr. Conlen: This is not cross-examination. I just make the point.

By Mr. Long:

Q. Phosphoric acid?

A. No. That is the condition we buy them in, and when they come to us they are dry, containing a certain percentage of these ingredients.

Q. These bones that you got in this cargo, were they consumo bones?

A. As I recall it they were half and half, what are known as half consumo and half campo. The contract will tell you. That will cover that point. There is always a basis.

Mr. Conlen: This is not cross-examination. The charter party covers it.

By Mr. Long:

Q. Taking the cargo of the "John Twohy," what in your experience would be the usual discrepancy between the intake and the out-take weight?

A. The loss runs around from time to time one or two per cent. There will be some losses to the ex-

tent of perhaps one per cent. Two per cent. at the most.

Q. Two per cent., you say?

A. Yes, that would be a fair average.

Q. Two per cent. is the highest?

A. No, that is a fair average, two per cent.

Q. How high have you known it to go?

A. There are instances of where it ran up to —

By the Court:

Q. This is between five and six.

A. —between three and four per cent., but that is exceptional.

By Mr. Long:

Q. You saw the bags as they were taken out of the vessel, did you?

A. No, I did not see the bags come out.

Q. But you at least saw the cargo right after the hatches were taken off?

A. Yes.

Q. The cargo was loaded up almost even with the hatch combings?

A. Yes.

Q. So that the vessel delivered a full cargo?

A. Apparently from the hatches.

Mr. Conlen: I object to that.

By Mr. Long:

Q. When she arrived at the yards, she was fully loaded with these bones?

A. Yes, as far as I could see. The hatches were full.

Q. There was no evidence that the bones had been tampered with after they had been loaded in the vessel?

A. No, sir.

At one o'clock P. M. a recess was taken until 2 o'clock P. M.

At 2 P. M.

HARRY C. BURRICHTER (cross-examination resumed).

By Mr. Long:

Q. You had purchased these bones from Duche & Son, had you?

A. Yes, through Cottman & Company. Duche were the principals.

Q. Was there any market for the damaged bones?

A. Apparently not. They were unable to sell them on the open market and declined to look around for a buyer.

Q. So that there really was not any market price for these bones so far as you know?

A. No, no fixed price for them.

Q. This deduction which was made from the contract price for the bones, \$5.70 a ton, was a matter of agreement between you and Duche's?

A. Right.

Q. How did you arrive at that figure?

A. The first step was to figure the cost of handling the white bones, considering expenses that were necessary to put on the wet bones other than those that

would have been put on the dry bones, hauling them to the pile, hauling them from the pile, mixing them with good bones, combining them with material that would bring up the test.

Q. In other words, what it would cost you to put these bones in the same situation as the sound bones?

A. As the sound bones.

Q. And Duche's agreed to that?

A. They agreed that that was a fair and reasonable charge.

Q. So that there was not any question of any market price about this at all?

A. No.

Q. How far up from the skin of the vessel were these bones wet, from what you know?

A. I should say about, what I saw in the hatch, through the hatch, about 3 feet.

Q. Was that just one hatch you looked into, or did you look into all the hatches?

A. I think at the time it was only possible to see through the one hatch, to see the skin. We had daily reports, however, submitted.

Q. I mean what you saw yourself?

A. Exactly.

Q. Do you know what hatch this was that you looked into, whether it was the forward hatch or midship hatch or after hatch?

A. I couldn't say now, no, because I don't recall the position of the vessel, I couldn't say.

Q. The top of these bones as I understood you to say was dry?

A. When the hatch was first removed.

Q. When the hatch was first taken off?

A. Yes.

Q. Was there any rain down there during the discharge of this cargo?

A. I couldn't say from memory, but nothing unusual, or it would have been noted.

Q. In piling these bones in your yard, you frequently have piled them there exposed to the air, have you not?

A. Yes.

Q. And you say you put them in these conical heaps so the water would drain off?

A. Yes. They are always piled in conical shapes, so that there is no danger of the bone becoming soaked.

Q. Of course when you are discharging a cargo of bones, you don't get these piles of bones into their conical shape until you have finished discharging the vessel?

A. Yes, they are always kept that way even if it is necessary to trim the pile.

Q. These dirty bones that you spoke about, are they the ones you got from down in the skin of the vessel?

A. Yes, they are the bones which we call damaged, which were taken from around the skin of the vessel.

Q. Did they look as if they were discolored by bilge water?

A. Yes, the stain of bilge-water, and the constant swishing of the bilge water against the bones.

Q. You knew when you first went down to look at the bones that the captain made a report that he experienced heavy weather and had shipped considerable water?

A. Yes.

Re-direct examination.

By Mr. Conlen:

Q. I understood you to say that Baugh & Sons are practically the only buyers of these bones here in this port?

A. Yes.

Q. And that the price that was fixed was the fair and market price for the bones?

Mr. Long: I object to that because the witness has just explained that there was no market price.

Q. Was or was not this price a fair market price for the bones?

A. Are you speaking of the damaged or sound portion?

Q. The damaged portion?

A. This was a fair price.

Q. You spoke about looking down the hatches when the vessel came in; how far down from the hatches were the bones?

A. Whatever the depth between the hatch and skin, less the 3 feet of white bones that were there.

Q. The whole cargo, when you first saw the cargo, how far away from the combings of the hatch?

A. I should say possibly a foot.

Re-cross examination.

By Mr. Long:

Q. Some of these bones had been removed of course before you got down to see them?

A. That is when the hatches were first taken?

Q. Yes?

A. When the hatches were first taken off, yes.

Q. And when you got there you say the cargo was about a foot from the top of the hatches?

A. Let me explain that. When we first went down there the hatches had been taken off, but no bones removed.

By Mr. Conlen:

Q. And that is what you are testifying about?

A. Yes.

SAMUEL H. JOHNSON, sworn.

By Mr. Conlen:

Q. You are connected with the government in what capacity?

A. Consular invoice.

Q. You are at the Custom House in Philadelphia here?

A. I am the keeper of the records and files, custodian of the records.

Q. We have asked you to produce the consular invoice covering this cargo?

A. I have it right here.

Mr. Conlen: I offer in evidence consular invoice

produced by the witness, which shows an invoice of 1,210,000 kilos of bones consigned by L. M. Duche & Sons, Ltd., New York, shipped by the schooner "John Twohy;" 287 bags of 12,747 kilos, and a bulk shipment of 1,197,253 kilos, making a total shipment of 1,210,000 kilos, and a total amount of invoice of \$22,654.24, Argentine gold.

CAPTAIN JOHN W. MOWATT, having been duly sworn, was examined and testified as follows:

By Mr. Conlen:

Q. What is your business?

A. Marine surveyor.

Q. In this port?

A. Yes.

Q. Whom do you represent as marine surveyor?

A. The admiralty Court or admiralty surveyor.

Q. Are you familiar with the schooner "John Twohy"?

A. I have seen her.

Q. Where have you seen her?

A. I have seen her over at Cooper's Point, and I have seen her down there at the B. & O., just below Spreckel's.

Q. She was repaired here in Philadelphia in 1915, was she not?

A. I don't know.

Q. Before 1915, the answer states that she was

here in this port in a wrecked condition; do you know that?

A. I have seen her over at Cooper's Point in a wrecked condition. I don't know the date.

Q. Where?

A. At Cooper's Point, Camden.

Q. Where was she laying at Cooper's Point?

A. I am not sure which shipyard it was now, but she was laying on that shore.

Q. Before she was at the shipyard, where was she?

A. I don't know.

Q. What was her condition at the shipyard when you saw her?

A. She was in a wrecked condition.

Q. What do you mean by that?

A. She appeared to have been ashore and taken off and placed there.

Q. Describe fully what her condition was.

A. I didn't examine her anyway.

Q. Can you tell me any of the details of her condition?

A. She looked to be in a pretty tough condition, that's all I know, badly hogged.

Q. Anything else?

A. That is all I noticed.

Q. In the answer to the interrogatories filed, the answer states "that the schooner 'John Twohy' was repaired prior to her voyage of October—November—December, 1915, in Philadelphia, the repairs being started February, 1915, and completed June, 1915; that the nature and extent of the repairs were a general overhauling subject to the requirements of the American Bureau of Shipping and superintended by the surveyor, and in the answer to the third interrogatory they say that the vessel was re-free-

nailed; bottom and top sides, all butts and wood ends respiked, caulked all over, 6 new beams, 2 lock strakes in 'tween decks, one 10 by 12 and one 12 by 12; about one-third 'tween decks new; 26 new hanging knees; rebolted keelson and keel, besides numerous other fastening and stiffening and turnbuckle rods forward."

What would that indicate to you that had been done to the vessel?

A. That would strengthen the vessel.

Q. Do those repairs or those furnishings indicate repairs or what to the vessel?

A. Yes, they would indicate repairs.

Q. Would it indicate rebuilding of the vessel?

A. Well, no, not exactly,—might be had usage.

Q. What would those different things supplied indicate, the replacing of other parts or what?

A. No, sir, the strengthening of the thing as a whole.

Q. What for instance would the turnbuckle rods be for?

A. To bind the vessel together.

Q. Can you describe how they are put into the vessel?

A. They are put in one over each side, with a turnbuckle from the center and screwed up tight.

Q. And they are one over each side, each side of the vessel?

A. Yes.

Q. And the object is to do what?

A. To tie the vessel together or draw her in.

Q. If in the course of using a vessel, a turnbuckle became loose or slack, what would be the thing to do to that turnbuckle?

A. I should say screw it up, tighten it.

Q. Would it strengthen the vessel to screw it up tighter?

A. It would bind her together more.

Q. Would that strengthen the vessel?

A. Yes.

Q. If you took it out, would it have a tendency to weaken the vessel?

A. The vessel would have a tendency to spread back to her original position before it went in there.

Q. Have you ever made a voyage down to Buenos Aires?

A. I have been there once—no, not to Buenos Aires,—Montevideo.

Q. Have you made a voyage down through those seas?

A. Yes, going down.

Q. And coming up?

A. No, I went around Cape Horn.

Q. Are you familiar with the sort of weather that is experienced down there?

A. A general knowledge of it.

Q. Suppose a vessel sailed from Buenos Aires in October of 1915, about the 21st of October, and proceeded for nine days in a voyage without incident, and then suppose the vessel encountered a north-east gale, with heavy seas, which increased to heavy squalls, and the heavy seas caused the vessel to roll and labor heavily, and then in the afternoon of that day the wind changed to west southwest, with heavy squalls, and the heavy seas continuing, and then on October 31st the weather cleared, with the wind still strong, and in the afternoon of that day there was a heavy blow of wind with heavy seas; would you say that was or was not an ordinary storm that could be anticipated in a voyage at that time of the year from that port?

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Mr. Long: I object, because there is no evidence that Captain Mowatt has ever made a voyage there at that time of the year. He said he went down there once. Furthermore, he is asking him to guess about the weather.

Mr. Conlen: I am reading from the answer to the libel.

By Mr. Conlen:

Q. When were you there?

A. About August.

Q. Are you familiar with the sort of weather that is to be encountered in those waters in October?

A. There is what they call pamperos there that are very heavy at certain seasons of the year, but I don't know just what season.

Q. They are encountered off the River Plata?

A. Off the River Plata, yes.

Q. If you were ten days out from that port, you wouldn't anticipate a pamperos, would you?

(Objected to.)

Q. How do you form your knowledge on that subject?

A. From nautical books.

Q. How long have you been concerned with nautical matters?

A. About 46 years.

Q. In what capacities have you acquired knowledge in nautical matters?

A. From boy to master.

Q. Master of sailing vessels?

A. Sailing vessels and steam.

Q. What seas have you sailed in?

A. Very much all over this world.

Q. For how many years?

A. I have been ten years ashore now.

Q. Have you talked with others who have sailed these particular seas, other captains?

A. I don't know—I have talked a good deal.

Q. And you have read about the seas, have you, in nautical books?

A. Yes.

Q. Do you feel competent to testify as to the sort of weather that is to be encountered at various seasons of the year in those seas?

(Objected to.)

The Witness: No, sir—what I have read about it I forget just about it, the dates and months.

Q. You are familiar with the term “gale” and “squall,” are you not?

A. Yes.

Q. Would a northeast gale and heavy seas be an unusual experience to a mariner?

A. No, sir.

Q. Would a west southwest wind with heavy squalls and heavy seas be an unusual experience to a mariner?

A. No, sir.

Q. Would a heavy blow of wind with heavy seas be unusual?

A. No.

Q. Suppose you found that a vessel had gone to sea and had encountered no heavy weather for ten days, and then encountered a northeast gale with heavy seas and heavy squalls on one day, and at 8 o'clock on the day that that weather started, suppose

the vessel began leaking, would that indicate an extraordinary condition to you or not?

A. No.

Q. Suppose you found that after having encountered that ordinary weather for a day, the vessel was leaking; would you think that was an ordinary occurrence or not?

(Objected to.)

Q. Has the term "dangers of the seas" any defined or definite meaning in the customs of the world to your knowledge?

A. Several.

Q. What are they, just define them?

A. Collision and gales of wind, hurricanes, breaking adrift from an anchorage.

Q. When you speak of hurricanes and gales, what do you mean, the ordinary gales?

A. An ordinary gale of wind is a gale of wind that a vessel could make some progress in her course under shortened canvass. A heavy gale of wind, there you probably have to be hove to, and when it comes to hurricanes, she has got to do the best she can.

Q. Under an ordinary gale of wind the vessel can either, as you say, lay to or go against the wind or run before the wind?

A. An ordinary gale of wind, she would run before, yes, under shortened sail.

Q. And the great danger of the sea is a hurricane?

A. Yes.

Q. Because in a hurricane as you say you have to do the best you can, is that true?

A. That's right.

Mr. Conlen: Mr. Long, I call for the log.

Mr. Long: I have already explained to Mr. Conlen that our log has been lost. Our log book has been thrown away or mislaid. Anyway it is lost. We did, however, have a copy of her marine protest and extended protest which was made from this log by Mr. Francis, a notary public, whom I have here in court, who will testify, and advises me that the protest is an exact copy of the log of this vessel.

The Court: Does that mean protest made within the time limit?

Mr. Long: Yes.

The Court: I understand your answer is then you are unable to produce the log because it has been lost or mislaid?

Mr. Long: Yes.

Mr. Conlen: You have what, a full or a partial copy?

Mr. Long: I have a full protest, which I annexed to my answer when I filed it here.

The Court: Does that furnish the full contents of the log book?

Mr. Long: Yes.

Mr. Conlen: You said before that it is not, and it appears on its face not to be.

Mr. Long: It covers the period from October 21st—

The Court: That is the best you can produce in answer to the call?

Mr. Long: Yes, I am producing the best I have.

Cross-examination.

By Mr. Long:

Q. You never made any examination of the "John Twohy"?

A. No.

Q. And when you saw her she was lying at Cooper's Point or was she down at Kaighn's Point?

A. Cooper's Point.

Q. At the shipyard of the Mathewson Company?

A. I wouldn't say at the shipyard.

Q. You weren't on board of her at any time?

A. No.

Q. You merely saw her as you were passing by in the tug boat?

A. No, I was on the wharf on other business.

By the Court:

Q. As I understand, you had no occasion to critically examine her, but looked at her just with that eye of interest that every sea-faring man looks at every boat that he sees?

A. Yes.

By Mr. Long:

Q. Will you tell me in your experience what, from your experience, do you believe to be the strongest part of a vessel; take a vessel like the "John Twohy," a wooden vessel?

A. Forward, the bow.

Q. These turnbuckle rods that were put in the "John Twohy," did you see them at all?

A. No.

Q. Have you seen turnbuckle rods in any vessel?

A. Yes.

Q. Are they put in when they are new or when they get older?

A. I have always seen them putting in when they are getting old.

Q. They are never put in when they are new?

A. I have never seen them.

Q. No necessity for them in a new vessel?

A. No, not in a good, strong vessel.

Q. Assuming that this turnbuckle rod which you were asked about consisted of a rod 1 1-8 inch of iron, that wouldn't have been sufficient to hold the bow of the "John Twohy" together?

A. That would hold a pretty good weight.

Q. It is nothing unusual, after a sailing vessel like the "John Twohy" has been through a northeast gale, that you find her leaking, a wooden vessel?

A. A wooden vessel always leaks.

Q. In other words, they get in a gale of wind and they roll and strain and open up the seams and water comes in?

A. All of them don't open up their seams.

By the Court:

Q. Isn't it a fact that a wooden sailing vessel is always making water?

A. Yes.

Q. Just a question of keeping her clear?

By Mr. Long:

Q. And there is nothing dangerous about that if a vessel has good pumps which keep her clear?

A. No, if they are keeping her clear, she is all right.

Q. She is considered tight, strong, staunch and seaworthy?

A. I wouldn't consider her tight if I knew she was leaking.

Q. Isn't it customary to consider such a vessel tight, staunch and seaworthy, a wooden vessel?

A. Yes.

Q. While you know they leak?

A. Yes, but very little.

Re-direct examination.

By Mr. Conlen:

Q. If a vessel was leaking 5 inches per hour, would you call that an ordinary leak?

A. No, that is a pretty good leak, 5 inches an hour, on a sailing vessel.

Q. Is it ordinary or not ordinary?

A. It is more than ordinary, if it is in fine weather.

Q. If she continued to leak six inches per hour, what would you think about it?

A. In fine weather?

Q. Yes?

A. I would think she had a bad leak.

Q. Suppose that the sky was merely forecast and there was a very light breeze and a moderate sea, and the vessel was leaking 6 inches per hour, would you think that was an ordinary leak or not?

A. I should think that was a serious leak.

The Court: Was that before or after the strain to which she had been subjected?

Mr. Conlen: After.

By Mr. Conlen:

Q. Suppose that was after a strain for a time?

A. Then if she had been leaking previous to that, I would not think it so serious.

Q. If she had not been leaking —

A. If she had been leaking through that gale of wind.

Q. You wouldn't think it was so serious?

A. No.

By the Court:

Q. In other words, if the vessel had been subjected to a heavy strain and starts to leak, and then the weather lightens, and the leak decreases, you would not consider it such a serious matter then?

A. No.

By Mr. Conlen:

Q. But supposing the leak increased, what would you think?

A. I think it was getting more serious, that something had started.

By Mr. Long:

Q. Do you remember that gale of wind that we had the day after Christmas, December 26th, 1916?

(Objected to.)

The Witness: No, I don't remember.

LIBELLANT RESTS.

(Counsel for respondent moves for a dismissal of the libel. Motion overruled.)

EVIDENCE ON BEHALF OF THE RESPONDENT.

JOHN F. FISHER, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. How old are you and where do you live and what is your business?

A. I am 65 years old and I live in Philadelphia, 807 Beechwood Street.

Q. What business are you in?

A. I represent the American Bureau of Shipping.

Q. What is the American Bureau of Shipping?

A. I look after classification of vessels and the rebuilding of vessels and rebuild them and everything connected with classification of vessels.

Q. The American Bureau of Shipping is a classification society?

A. I presume so.

Q. They are sometimes referred to as the American Lloyds?

A. The American Lloyds is the same thing, American Bureau of Shipping, and American Lloyds, the same thing. I represent both.

Q. How long have you represented the American Bureau of Shipping at this port?

A. 11 years.

Q. Prior to that what did you do?

A. I went to sea.

Q. How long did you go to sea?

A. 44 years.

Q. In what capacity?

A. In every capacity.

(Qualification of the witness admitted.)

Q. Did you have anything to do with classifying the schooner "John Twohy" in 1915?

A. Yes.

Q. Did you have anything to do with looking after her repairs?

A. Practically all to do with it, so far as classification was concerned.

Q. What do you mean by that?

A. I mean I told them what to do, what had to be done and what was done, and looked after what was done.

Q. And you did that as surveyor for the American Bureau of Shipping?

A. American Bureau of Shipping, through the classification committee.

Q. Did you see that what was ordered was done?

A. Yes, and more too. More than I ordered was done. I have all the specifications in my pocket, if you wish to look at them, what was ordered done and what was done.

Q. Suppose you tell us what you ordered done and what was done?

A. I can't tell you, but I can let you look at the specifications I have.

(Witness produces paper which is handed to Mr. Conlen.)

The Witness: In the first part is what I ordered done and in the after part what was done.

Mr. Long: This was her first voyage after this reclassification. That is, she sailed down with lumber and came back with these bones.

The Court: She had been overhauled before she made that trip?

The Witness: Yes, before she started she was overhauled. There were no rods ordered in that specification. There were no rods ordered put through her bow.

By Mr. Long:

Q. You ordered no turnbuckle rods put in her?

A. No, sir, I didn't order any. Whether any were put in there—possibly there was—I don't know.

By Mr. Long:

Q. I understood you to say more was done to this vessel than you ordered?

A. There was.

Q. Did you order all that you considered necessary?

A. I ordered everything that I could see the vessel needed.

Q. And they did more?

A. They did more.

Q. What was the condition of this vessel so far as being tight, staunch, strong and seaworthy, when these repairs were done and you had seen that they were done?

A. She was in a seaworthy condition when the builders were done with her. After they carried out my recommendations she was in a seaworthy condition, because I allowed her a five year A1 1-2 class. I recommended that to the American Bureau of Shipping.

Q. To carry what kind of cargoes?

A. Perishable cargoes, dry and perishable cargoes,—no specific kind.

Q. Is this a copy of the certificate that was granted (showing paper to witness)?

A. I presume it is. That is a copy of it, A1 1-2, five years, from April, 1915, just what I recommended.

(Certificate marked Respondent's Exhibit 1 for identification.)

Q. This paper I have here is the one you prepared?

A. Yes.

Mr. Long: I ask that this paper be marked for identification.

(Paper marked Respondent's Exhibit 2.)

Q. Assuming that there was a turnbuckle rod put in the bow of this vessel below the water line, 1 1-8 inch rod, would that tend to greatly strengthen the bow of the vessel?

A. In the first place I don't understand why it should be put there. I don't know why it should be there. I have nothing to do with putting it there. I didn't know it was there until this question came up.

Mr. Conlen: I ask that that be stricken out as not responsive.

The Witness: I don't consider it was any good there, because it was only 8 feet long. It couldn't have been any good to the vessel, very little, if any. I can't see where it was any benefit to the vessel. There were two there as I understand now. I can't see any benefit either one of them were to the vessel, yet we put them in old vessels, but I have known them to be put in new vessels. I had a new vessel to be looked after when she was brand new, and they put those rods across her.

Q. Without that turnbuckle rod, what have you to say as to the seaworthiness of the "Twohy"?

A. Without the turnbuckle?

Q. Yes?

A. I say the breast hooks and pointers was sufficient to hold the bow. That is what we put the breast hooks and pointers in for, to bind the bow together. That is what they are for.

Q. Where were these repairs made?

A. Some of them at Cooper's Point and some of them at the Philadelphia Ship Repair Company.

Q. Both places Mathewson & Company?

A. Yes. They couldn't haul her out at Cooper's Point and they hauled her out to the Philadelphia Ship Repair Company,—did all the work to the bottom at the Philadelphia Ship Repair Company.

Q. You went all over it?

A. Yes, and all through her and under her and everywhere else, every piece of wood that could possibly be seen about her I seen, I guess.

Cross-examination.

By Mr. Conlen:

Q. I understand there were two of these turn-buckles in the bow of the vessel?

A. I understand they were.

Q. And I understand that it is sometimes customary to put them in new vessels?

A. No, I can't say it is the custom, but I had one new vessel built they put them in. I didn't order them in.

Q. I understand you did not consider they strengthened the vessel at all?

A. In some cases they do, in some places where they are, but in the bow of the vessel, where those two were, I don't consider they strengthened the vessel any.

Q. Wouldn't strengthen the vessel at all?

A. I don't consider them so, I don't consider they are any use there, because they got the breast hooks there and pointers.

Q. This vessel was a wreck before she was at the shipyard?

A. I didn't say it was a wreck.

Q. How long had she been in a wrecked condition or a state of disrepair?

A. That I don't know.

Q. Suppose you had granted a certificate of seaworthiness such as this on a vessel and she started off on a voyage to Buenos Aires with a cargo of lumber, and suppose when she reached there with a cargo of lumber, that a hundred thousand feet of lumber was found to be damaged by sea water, and that the vessel had been leaking, would you still say the vessel was seaworthy?

A. I would. Excuse me, I was in a vessel one time, a brand-new vessel and we left Philadelphia here, and she was built here in our district. I was schooner master, I remember, and the fifth day out she commenced to leak and she leaked for over sixty odd days. We pumped her. She wasn't considered unseaworthy. We went to Cuba and unloaded the cargo of molasses and came home with her. That was a brand-new vessel, the first trip she made.

Q. Was it the American Bureau of Shipping that gave a certificate of seaworthiness to the Meander, the River Meander?

A. I don't know.

Q. Are you familiar with the fact that within a year or so a schooner, a sailing vessel or schooner, was given a certificate of seaworthiness and sailed from New York, and in fair weather within a few days after sailing, she opened up all her seams and sank; you are familiar with that, are you not?

A. No, sir, I haven't got anything to do in New York. I am only in this district. I don't remember ever hearing tell of that vessel.

Q. You never heard tell of such a case?

A. I don't think I have.

Q. Have you ever heard tell of any case where a vessel left any of the ports of the North Atlantic with a certificate of seaworthiness and in fair weather opened up her seams and sank?

A. I can't remember ever hearing of that.

Q. If you did hear of such a case, would you say the certificate of seaworthiness did not represent the condition of the vessel?

A. Excuse me now, I want to tell you another case. I looked after a case of a vessel down in Beaver, Delaware, about four years ago. I gave her a seaworthy certificate, recommended her one, and gave her a class, and then she got to Cape Hatteras and she sank, a brand-new vessel. That is a case I can give you, but she had a hole in her they didn't plug up, and she sank. They lost the vessel.

Q. Suppose you have a case where there is no hole?

A. Then she won't sink, if she hasn't any hole in her. I never knew one to sink yet, but what had a hole in it. I knew a good many to sink, but they had a hole in, every one of them that sank had a hole in somewhere.

Q. Was the vessel repaired when it came back to Philadelphia?

A. That I don't know. I hadn't anything to do with that.

Q. Under ordinary circumstances you should have, should you not?

A. I should have, yes, but I did not. I guess I was busy that time and I wasn't called on. I know she had some work done, I heard so.

Q. You know there was some work done on her?

A. I heard so. I couldn't swear to it, because I didn't see it.

Q. Did you inquire into what work was done on her?

A. No, sir, I did not.

Q. Your certificate calls for cancellation if work is done without notice to you, does it not?

A. I don't think so.

Q. What is the condition of your certificate?

A. I don't know. You can read it.

Q. You don't know what the conditions of your certificate are?

A. I don't remember all the conditions of it.

Q. Do you remember any of the conditions of the certificate?

A. Oh, yes.

Q. What is the main condition in your mind of a certificate of seaworthiness?

(Objected to.)

The Court: They have the certificate there and if you wish to know any of the conditions, you can refer to it in half a minute.

Q. You know that one of the conditions is that the surveyor must be called whenever the sheathing is being stripped or renewed or the vessel is being caulked or repaired, to have same endorsed hereon?

A. Yes. I don't think her sheathing was stripped off.

Q. But this is if the vessel is repaired; you know that she was repaired after this voyage and you weren't called in, do you not?

A. Yes.

Q. And you still continued this certificate of seaworthiness?

A. Yes.

Q. And in your judgment this certificate of seaworthiness will continue for the next four or five years?

A. I presume it will if something don't happen to the vessel. Something might happen and they don't live up to the agreement or other.

CHARLES S. FRANCIS, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. You are a notary public in the State of Pennsylvania residing in Philadelphia?

A. Yes.

Q. And you were from the 7th of January, 1916?

A. Yes.

Q. You have been a notary public I suppose for some years?

A. Yes.

Q. Your work is mostly with vessels in preparing protests and extending protests?

A. Everything in connection with the entrances and clearance of vessels and protests of vessels.

Q. How long have you been handling this work?

A. 20 years, 25 years.

Q. Do you remember preparing a protest of the schooner "John Twohy," Captain Forsyth, in January, 1916?

A. Yes.

Q. From what did you prepare that?

A. From the log book.

Q. Who was present when you prepared it besides yourself and Captain Forsyth?

A. Captain Forsyth had his men. Of course, I can't name the men just now. He insisted on having a number of men, three or four men there to sign.

Q. In preparing your protest you say you used your log book of the schooner?

A. Yes.

Q. That was given to you by the captain?

A. By the captain.

Q. And you consulted the log book in the preparation of the protest?

A. Always, yes.

Q. Did you in this case?

A. Yes, taking a copy of the log book.

Q. Is this a copy of the log book from the date of October 30th, and on the various days set forth in the protest?

A. You will no doubt notice on the back of that that I have certified that to be a true copy of the original protest on file.

Q. And that is a true copy?

A. That is a true copy, yes.

Q. Is this also a copy of the log?

A. A copy of the log.

(Paper marked for identification Respondent's Exhibit 3.)

Q. Is it customary in preparing a protest where there is no incident connected with the boat to put the whole log in, or do you just put the incidents in?

A. Where a vessel has been having heavy weather, we note the days she has had her heavy weather, but

where there is nothing occurring on certain days, we merely state the vessel has been proceeding on the voyage, nothing unusual occurring. Of course the only thing that is noted in the log book is the state of the wind and weather.

By the Court :

Q. In this case, nothing else bearing on the subject-matter of the protest than certain conditions of the weather on certain dates?

A. And if any damage, this was stated.

Q. But I say in this case there was nothing bearing on the question of damage other than the state of the weather?

A. The state of the weather, wind and weather.

By Mr. Long :

Q. You have no interest in this case?

A. I have no interest, no interest at all.

Q. You merely acted as a notary public?

A. Yes.

Cross-examination.

By Mr. Conlen :

Q. You say you prepared this from the log book?

A. Yes.

Q. Did you see the log book?

A. Yes.

Q. The log book contained the details of the voyage that preceded this, did it not?

A. I have nothing to do with that.

Q. I ask the question, did it or did it not; you saw the log book?

A. I saw the log book, but I didn't notice that.

Q. And this protest would not contain a true copy of the log, because you have just taken and lumped the dates together and said nothing unusual occurring?

A. That is the idea.

Q. Do I understand that when it does contain details, you keep the whole of the log, the day it contains the details, that you take in everything that happened?

A. I took each day, each day.

Q. The complete day, everything on the log?

A. Each day, but as I stated before, that where is nothing occurring that needed to be stated in the protest, we say, "Nothing unusual occurring" at that time. Frequently a vessel on a long voyage—for each day all that is stated is the wind and weather. Where a vessel has fine weather and smooth seas, we make no notation of that whatever—merely where there is anything occurring.

Q. I find eight days here in which details are given; I understand that out of this voyage that took several months' time, you have only copied in detail eight days?

A. We copied the entire voyage. We got a notation to each day.

Q. The details I am talking about?

A. No.

Q. You have only given the details for eight days?

A. Yes.

Q. What did you do with the log book after you were through with this?

A. Returned it to the men when they came to our office to swear.

Q. Returned it to the captain?

A. I am not familiar whether it was the captain or one of the men, but the captain who came to swear to the protest before me. The protest was read to the men.

C. A. DAVIDSON, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. How old are you and what is your business?

A. 57 years old; foreman at the present time of the Philadelphia Ship Repair Company.

Q. How long have you been engaged in that business of building and repairing wooden vessels?

A. Since I was about 15 years old.

Q. That is 36 years?

A. Yes.

Q. What shipyards have you worked in?

A. I worked at Mathewson & Company, S. W. Tilton & Company.

Q. The Philadelphia Ship Repair Company?

A. The Philadelphia Ship Repair Company.

Q. During that time have you built and repaired all classes of sailing vessels?

(Competency of the witness admitted.)

Q. What, if anything, did you have to do with the repairs of the "John Twohy" in the spring of 1915?

A. We put her on the dry dock, refastened her bottom up above light water, re-treenailed her, respiked the butts, refastened the stem and stern posts, refastened her keel and keelsons, caulked her up above lightwater and cemented the seams, painted her bottom—no, painted the bottom the second time. Didn't paint her when we had her on first.

Q. From that shipyard where was the vessel taken?

A. Taken to Cooper's Point, Mathewson & Company.

Q. Were any repairs put on her there?

A. They repaired her top sides up there.

Q. Were any repairs made to her inside?

By Mr. Conlen:

Q. Do you know?

A. I am not familiar with the repairs that were done inside of her.

Q. About these turnbuckle rods, what is the strongest part of the vessel?

A. The bow is the strongest part of a vessel.

Q. Was that true of the "John Twohy"?

A. Yes.

Q. Why is that?

A. There is nothing there to push them out or in. They are like a wedge, more like a wedge,—no body to them there, like there is back amidships and around.

Q. About the turnbuckle rods, assuming that there were two turnbuckle rods in the bow of this vessel, one below water line and one above, and that they

were iron, 1 1-8 inch thickness—did you see these turnbuckle rods I am talking about?

A. No.

Q. These turnbuckle rods being located about 3 feet aft from the stem, in your opinion was it necessary to have these rods in there to make that vessel tight, staunch, strong and seaworthy?

A. I can't see where they would do any good in there.

Q. Why wouldn't they do any good?

A. The vessel, when she is built, her planks all come together on the apron and stem, and everything is fastened to that, and I don't see where any turnbuckles would do any good, and it is unusual to put turnbuckles in a vessel's bow. You might put one in back 10 or 12 feet from the butts sometimes, but we put in lots and lots of them at our place.

Q. Where do you put them in generally?

A. Generally put them in there, back about 25 feet from the bow, start about 25 feet from the bow, and put in about 5 or 6, sometimes 4, back of the cabin.

Q. What is the purpose of putting those in there?

A. I don't know. Some people get the notion that the vessel works a little in the planks there. Having heavy deck loads on the vessel, they have an idea that that helps to hold them together.

Cross-examination.

By Mr. Conlen:

Q. Were the turnbuckles put in at your shipyard?

A. No.

Q. But you say you do put in lots and lots?

A. Yes.

Q. Why do you put them in the vessels?

A. Because the owner orders them put in,—put them in according to the orders.

Q. Never put them in unless the owner orders them to be put in?

A. No.

Q. If they are put in 25 feet from the bow, what are they put in for?

A. They have a notion that they help to hold them together with a heavy deck load, where they are carrying a heavy deck load.

Q. They do not assist in holding them together if they are carrying a heavy load in the body of the vessel?

A. Never say anything about that. They always holler about the heavy deck loads.

Q. You say you refastened her bottom; why did you refasten the bottom of this vessel?

A. We do that often to any vessel.

Q. Why did you do that to this vessel?

A. Because the owners ordered it done.

Q. That is the only reason?

A. That is the only reason.

Q. Was the bottom ordered open?

A. The inspectors ordered it done.

Q. Was the bottom open?

A. No, sir, she had a fine bottom on her.

Q. You refastened the stem and stern posts; were they loose?

A. No.

Q. Why did they need fastening?

A. Just did it —

Q. Just to do it?

A. Just helped to hold it together, in case there is any strain or anything on it.

Q. I suppose you didn't need caulking either?

A. Oh, yes.

Q. Did she need caulking?

A. They had to caulk her because she had been full of water.

Q. Where had she been full of water?

A. She had been full of water—came up here full of water.

Q. Came up there from where full of water?

A. Down in the bay somewhere.

Q. Had she been under water in the bay?

A. Hadn't been under water. She was loaded with lumber.

Q. How full of water was she?

A. I couldn't tell you that.

Q. Was she repaired at your yard after this voyage?

A. Yes, we did some repairing.

Q. What repairing did you do after that?

A. Put in some new knees in her and some new deck bottoms, parts of new deck beams, quite a number of little repairs.

Q. Did you put these bolts back again, the turn-buckle rods?

A. I think we put one of them back. I have an assistant here, Mr. Phillips.

Re-direct examination.

By Mr. Long:

Q. You say you think you put one back; do you know whether you did or not?

A. I don't know. My assistant attended to that work and I couldn't say.

By Mr. Conlen:

Q. Your assistant isn't here?

A. Oh, yes, he is here.

JOHN PHILLIPS, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. How old are you and what is your business?

A. 47; I am assistant to Mr. Davidson, Philadelphia Ship Repair Company, shipwrights here.

Q. Assistant foreman?

A. Yes.

Q. How long have you been a shipwright?

A. 25 years.

Q. Repairing wooden vessels in that time?

A. Wood and iron both.

Q. Do you remember these repairs made for the "John Twohy"?

A. After the first trip, yes.

Q. In the spring of 1915, before she made a trip to South America?

By Mr. Conlen:

Q. After the first trip, you understand?

A. No, the first trip to and back, the first trip.

By Mr. Long:

Q. Do you know the repairs that were made before the first trip?

A. Yes.

Q. That is in the spring and summer of 1915, what was done then?

A. Just the same as Mr. Davidson told you, hauled her out, recaulked the bottom, refastened all the butts and wood ends.

Q. What was the condition of her bottom when you examined her?

A. First-class the bottom was, yes.

Q. Did you see Captain Fisher down there while this work was being done?

A. Yes, many a time.

Q. What did he have to do with it?

A. He classed her,——

Mr. Conlen: He testified to that. That is the best evidence. I object to this.

Q. Who gave the orders as to what should be done down there?

A. Captain Fisher. He issued specifications.

Q. After the vessel came back from this trip, did you have charge of any repairs made down there?

A. Yes.

Q. What about the turnbuckle rods, what is your opinion about them?

A. There were two in there and when they put one of them in they didn't put it in right. It was no earthly use at all.

Q. You say they were no earthly use?

A. No. When you put a turnbuckle in you have to put it in right square across the ship, and they bored a hole and put it in and bent it around and doubled it up so it was no good.

Q. These were not put in at your orders at all?

A. No.

Q. What do you say as to the necessity of having these turnbuckle rods in a vessel in order to make it tight, staunch, strong and seaworthy?

A. There was no necessity at all at this time anyhow. I didn't know what they put them in for, because it was better out than it was in. We put in all new breast hooks and pointers forward to overcome that work.

Q. Where is the strongest part of the "John Twohy"?

A. Right there.

Q. Where?

A. In the bow.

Cross-examination.

By Mr. Conlen:

Q. You say you put in breast hooks and pointers to overcome that; overcome what?

A. Overcome these turnbuckles. I don't know what they put them in there for.

Q. To take the place of the turnbuckles?

A. Didn't need them there at all.

Q. That is what you put the breast hooks there for?

A. Yes. They are on there. We put new ones in to strengthen them.

Q. Did you put in the turnbuckle that had been taken out?

A. Yes.

Q. So you put the bolt in again after having made the first trip, is that right?

A. Yes, we put that back,—didn't want that hole.

Q. So there was one in there, and had two turnbuckles just as it had before going on the trip?

A. Yes.

Q. And you say that that was unnecessary?

A. So it was.

Q. And this time it hadn't been ordered by Captain Fisher, because he wasn't down there?

A. When we were doing this work?

Q. Yes, the second time?

A. Oh, yes, indeed.

Q. Were you down the second time?

A. Yes.

Q. You heard him testify he didn't know it was being done?

A. He didn't know about the turnbuckles, but he came down about these breast hooks and pointers. This boat was in first-class condition when she left.

Q. Then he did come down there; he was wrong when he testified that he didn't go down there to see about it?

A. Didn't go down to see about the turnbuckles.

Q. But he testified he wasn't down there when this ship was repaired the second time; now you say he was, that is right, isn't it?

A. Certainly he has to go down to—we had this work to do and he has to look at it.

Q. He ordered the breast hooks in, did he, on this second time, the second repairs?

A. Mr. Cummins here ordered the breast hooks in. I don't know what he ordered. He was down there looking to see if it was done.

Q. Did Captain Fisher—you don't know what he ordered?

A. No.

Q. You were wrong in testifying before he ordered breast hooks in?

A. We got to go by these specifications.

Q. Did he specify these breast hooks?

A. I don't know anything about that. How do I know whether he did or not?

Q. But you had the specifications the second time, specifying the breast hooks?

A. We had specifications. I don't know where they came from.

Q. You say the one that was in there was so placed that it was no earthly use?

A. No—in there it was.

Q. What earthly use would it be if it was properly placed?

A. Didn't I tell you we just put it back there to protect —

Q. Answer the question?

A. I told you it wouldn't be any use at all.

Q. And yet you put her back?

A. Certainly.

Q. You are a shipwright?

A. Yes.

Q. And you had charge of this work?

A. I had charge of the work, yes.

Re-direct examination.

By Mr. Long:

Q. You didn't have charge of laying out the work?

A. No. The work was all laid out by specifications. We got to carry them out.

Q. You are speaking now, when you speak about specifications, when the first repairs were made?

A. Yes.

Q. They were made under the supervision of Captain Fisher you say?

A. Yes.

Q. When she had gone to South America and came back, did Captain Fisher have anything to do with these second repairs?

A. I don't know whether he did or not, but I say he went down there and looked at them.

Q. You ordered these turnbuckles put there, do you know?

A. Who ordered them put there? No, I don't know who ordered them put there. They were on there, only this one that was taken out.

Q. I mean who ordered that one to be put back?

Mr. Conlen: He says he doesn't know.

The Witness: I don't know whether it was the captain or who it was. I can't remember all those things. I only know we put it back.

Q. These breast hooks you were talking about, were they put in there when the vessel was first repaired?

A. They were all reconstructed, rebolted, re-fastened and all, but that vessel has been caught in some kind of a gale, and loosened everything up.

By Mr. Conlen:

Q. Never mind that.

A. I could tell something about it.

By Mr. Long:

Q. Could you tell from your examination of the vessel which you made prior to putting in the second set of repairs, as to whether the vessel had been through a heavy gale of wind?

(Objected to.)

By the Court:

Q. Could you tell us whether or not she had been subjected to a strain?

A. You could tell by her bolts she had been strained, and there were 23 knees we had to put in, 22 6-inch and 1 8-inch.

Q. The second time?

A. The second time after she came back loaded with these bones.

Q. There was indication of a strain?

A. Yes.

Q. Heavy strain or light, or great or large would you describe it?

A. A heavy strain, loosened her up the way she was, or else we would not have had to have done that work.

Re-cross examination.

By Mr. Conlen:

Q. You say you put in 22 knees?

A. Yes.

Q. What else did you put in on your second repair?

A. I think there were four beams.

Q. What beams?

A. The 'tween deck beams. You will find they weren't hole beams. We had to put in the scarf beams about half way across.

Q. You took the old beams —

A. They were old beams, and she had worked —

Q. And strengthened them?

A. No, we had to take that part out, where she had all pulled loose from the knees.

Q. And so there were beams repaired?

A. I think it was four. I think there were hatch coamings we put in.

Q. What else?

A. And a lot of decking, some 'tween deck decking.

Q. What else?

A. I guess that's all.

Q. Was all the stuff that you put in there new stuff; you put in new stuff, did you not?

A. Certainly I put in new stuff.

Q. That took the place of old stuff?

A. No, had to take it out.

Q. And the old stuff was old stuff that was in the vessel before the first repair, was it not?

A. No, not all of it was not.

Q. How much of it was?

A. You remember when this vessel was rebuilt she was all refastened.

Q. The four beams were old beams, weren't they?

A. Yes.

Q. How many of the knees were old knees?

A. They weren't so bad and they were loose on the posts.

Q. How many of them?

A. There must have been 22 or we wouldn't have taken them out. They had to come out.

Q. The hatch coaming, was that an old hatch coaming?

A. Yes.

Q. And the 'tween deck decking, was that old?

A. We had to take the deck up to get the beams in.

Q. That was an old deck you took up?

A. No, it didn't have to come up only for that.

Q. You only took that up to get the beams in?

A. Yes. That's what I say, she had worked so bad, she had worked the stuff loose.

Q. Never mind that; what did you do under the water line?

A. I told you a while ago we caulked her and re-fastened all the butts and wood ends.

Q. The second repair?

A. Oh, no.

Q. Didn't do anything under the water line?

A. Only hauled her out and painted her.

Q. That is all you did?

A. Certainly. We hauled her out the second time, didn't we?

Q. You hauled her out; what did you do to her bottom?

A. I think we caulked her bottom too and painted her again, cemented. Where we caulk her, we got to cement it over again.

JOHN C. DOUGHERTY, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. How old are you and what is your business?

A. Shipwright and caulker.

Q. Where are you employed?

A. Mathews' shipyard.

Q. How long have you been in the shipwright business?

A. About 33 years.

Q. What class of vessels have you been working on during that time?

A. All kinds.

Q. Do you remember the repairs made to the "John Twohy" in Mathews' Shipyard in the spring and summer of 1915?

A. Yes.

Q. Did you have anything to do with making those repairs?

A. With regard to the caulking and refastening the top sides, from lightwater up.

Q. Did you have charge of installing any beams 'tween deck, or anything of that sort?

A. No.

Q. Who did that?

A. Another boss.

Q. Was that work done there at your yard?

A. Yes.

Q. Was Captain Fisher present when this work was being done at Mathews'?

A. Yes, I seen him there.

Q. What orders, if any, did he give?

A. With reference to this work, regarding the making the vessel seaworthy.

Q. Did you see the vessel after these repairs were finally completed?

A. I think I did, yes.

Q. What in your opinion would you say as to whether she was tight, staunch, strong and seaworthy?

A. When the vessel left here, she was all right.

Q. Who put the turnbuckle rods in the vessel?

A. Some of our men over there.

Q. What was the strongest part of this vessel, this "John Twohy"?

A. Forward.

Q. What was the purpose of these turnbuckles?

A. I never seen turnbuckles put in the bow of a vessel in my life.

Q. In your opinion was there any necessity for the insertion of these turnbuckle rods in the bow of the "John Twohy" at this time?

A. Not as I know of, no.

Q. Did they tend in any way to strengthen the bow?

A. No, sir.

Q. Where are the turnbuckle rods generally put in a vessel?

A. All the way from abaft the forerigging to the forward end of the house.

Q. What is the purpose of putting turnbuckle rods in there?

A. To hold them together when they commence to work, and we put them in there to stiffen them up.

No cross-examination.

ALBERT D. CUMMINS, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. How old are you?

A. 42.

Q. What business are you engaged in?

A. Vessel owner and vessel agent.

Q. Have you had any experience in serving time in a shipyard?

A. Seven years.

Q. Whose yard?

A. S. W. Tilton & Sons.

Q. For how long have you been a vessel owner and ship broker in the port of Philadelphia?

A. 19 years.

Q. How many vessels do you own?

A. I own parts of 10.

Q. Have you had any experience in repairing or rebuilding vessels?

A. Yes.

Q. What experience, covering what period of time?

A. I look after all the repairs to our line.

Q. And you have had vessels repaired in what ports?

A. Near every port on the coast, down to the Gulf of Mexico.

Q. You are part owner of the "John Twohy"?

A. Yes.

Q. You purchased her, did you not, after she had been ashore in the Cape Fear River, North Carolina?

A. Yes.

Q. And brought her to Philadelphia?

A. Yes.

Q. Who made the repairs on the "John Twohy"?

A. Philadelphia Ship Repair made the repairs to the bottom, and the keel and keelson refastening, and John H. Mathewson made the repairs to the top deck and inside.

Q. Just what in a general way was done to this vessel?

A. We re-treenailed the planking through every

frame from keel to deck, respiked all wood ends and butts; caulked from keel to deck; rebolted stem and stern posts, new rudder stock, new forward house and practically a new cabin; about one-third of deck new, about one-third of rails new, about one-half of 'tween decks new; fully 30 or 40 new hanging knees —

Q. Where are they put, those hanging knees?

A. Below the beams and 'tween decks; to brace the 'tween deck beams we put two strakes of timber practically the whole length in the 'tween decks, one strake 14 by 14 and one strake 10 by 12, on top of that edge bolted and through bolted, practically all new rigging, new suit of sails; engine room and cabin outfit, all bolts and such other minor repairs that would be necessary in a shop of that kind.

Q. What pumps were installed on this vessel?

A. Two new 6 inch Worthington pumps, one forward and one aft.

Q. Steam pumps?

A. Yes.

Q. You had a steam boiler on this ship?

A. Yes. We had feed pumps and circulating pumps of course in addition to that, a feed pump and a circulating pump.

Q. After you had completed these repairs, you received a certificate from the American Bureau of Shipping?

A. Yes.

Q. Is this a copy of the certificate (showing paper to witness)?

A. That is a copy. The original was lost.

Q. This is a true copy?

A. Yes.

Q. After you had gotten your boat in shape, what did you do in reference to securing a charter?

A. Chartered the vessel for a cargo of spruce and pine lumber from Philadelphia to Rosario.

Q. Did she make that voyage safely?

A. Yes.

Q. Did you have any claim made upon you for a damage to that cargo?

A. None whatever.

Q. Something has been said here as to the return of the schooner on this voyage with a cargo of bones—were you present when her hatches were taken off?

A. Yes.

Q. What can you say as to whether she had a full cargo at that time?

A. She was full to the hatches.

Q. Did you see these bags containing the bones?

A. I was there a part of every day and I did see bags coming out—didn't pay much attention to the bags.

Q. You don't know just what part of the vessel they were in?

A. No.

Q. Did you see the damaged bones?

A. I saw part of them—I don't know—I saw a pile of bones they said was from her cargo.

Q. What was their condition as you saw it?

A. They were piled up out in the yard over in one corner of Baugh's place.

Q. Was there any cover over them?

A. None whatever.

Q. Out in the open?

A. Yes.

Q. Did you see the hold of the vessel after the cargo was taken out?

A. Yes.

Q. Was there evidence in there of any leaks or strains?

A. Yes.

Q. Did you go over the vessel and examine her after this cargo was taken out?

A. I did.

Q. What, if anything, did her condition show as to the experience which she had had on this voyage?

A. She was strained both forward and aft.

Q. Was she badly strained or what was the condition of the strain?

A. Badly strained.

Q. Were any repairs made to her?

A. Yes.

Q. Where were they made?

A. Philadelphia Ship Repair Company.

Q. Going back to the repairs that were made prior to the vessel's departure, will you tell me whether or not they are the bills for the repairs (showing papers to witness)?

A. Yes.

Q. What people are they from, what shipyard?

A. They are only some of them,—not from any particular shipyard. They are separate from the shipyard bills.

Q. What do you mean by that?

A. The bills in all amounted to about \$22,000 for the original bills. There is not a shipyard bill here.

Q. What are these bills?

A. Sail bills, blacksmith's bills, caulker's bills —

Mr. Conlen: I don't see the point of this.

Mr. Long: I merely want to give the Court some idea of the magnitude of the repairs by showing the price.

The Court: You don't do that by showing the magnitude of the bills. The witness can state the condition.

Q. What was the condition of this vessel after these repairs had been completed at the time she departed on her voyage of lumber for the Argentine Republic?

A. I considered her equal to a new vessel.

Q. What was her condition as to being tight, staunch, strong and seaworthy?

Mr. Conlen: Are you talking about the time she departed from Philadelphia here?

Mr. Long: Surely.

Mr. Conlen: Of course this witness' interest is manifest, but I don't know whether he is competent to testify as to her condition.

The Court: He is not only a vessel owner but managed vessels for a number of years and also had experience and training in the building of vessels.

The Witness: I am the president of a shipyard now, the Delaware Shipbuilding Company.

Q. At Seaford, Delaware?

A. Yes.

Q. Tell me, what was the condition of this vessel?

(Objected to.)

A. I considered her equal to a new vessel. She was tight, staunch, strong and seaworthy.

Q. On her return from this trip from Buenos Aires

when she came up here with these bones, I understand you examined her and went over her and saw she was strained both forward and aft; did you have any repairs to make to her at that time?

A. I did.

Q. Just what was done?

A. I had new breast hooks and pointers put in forward.

Q. Why was that necessary?

A. Because she had worked the fastenings and the ones she already had in her. I had a lot of new beams and knees put in the after end of her 'tween decks.

Q. Why was that necessary?

A. She had worked there, she had worked in both ends.

Q. Had worked loose?

A. Yes. She started her fastening, her iron work.

Q. How about her hatch coamings?

A. That was one of the beams that had become—looked as if it was gone at the end. The fastening started, and it came in the wake of the hatch so I took it out clear across and put new hatch coamings in there,—let the beams cover the whole length.

Q. Was anything done in reference to her mast head plates?

(Objected to as immaterial.)

Mr. Long: I tender Mr. Conlen the bill of the Philadelphia Ship Repair Company for these repairs, giving details, the bill being dated March 8th, 1916.

Q. About these turnbuckle rods, this vessel had two of these turnbuckle rods in her; do you know why they were put in there?

A. A whim of mine.

Q. What do you mean by that?

A. I was so anxious to make the vessel good, I did everything I thought would help a little.

Q. Had you ever seen these turnbuckle rods used in the bow of vessels prior to this time?

A. No.

Q. Where are they generally put?

A. Under the beams, under the upper deck beams.

Q. Did these turnbuckle rods contribute anything to the strength of that bow?

A. No, I guess not. I don't think so.

Q. Where was the strongest part of this vessel?

A. In her bow, supposed to be in every vessel.

Q. Why is that?

A. The wood along the 'midships, the beams are separated about 10 inches. When you get up around the bow it is all solid timber.

Q. At the return of this vessel, did you see where this turnbuckle rod had been taken out?

A. Yes.

Q. Where it had been taken out, what was the condition there as to being tight?

A. It was still tight when she got to Philadelphia.

Q. Since this time have you been using this vessel regularly on ocean voyages?

(Objected to.)

The Witness: Yes.

Mr. Long: It is merely to show that the very same people wanted to charter her again.

The Witness: There are \$22,000 repairs against \$2,000.

By Mr. Long:

Q. The first repairs cost you you say about \$22,000 and these about \$2,000?

A. Yes.

Mr. Conlen: That is objected to and I ask that it be stricken out.

The Court: You mean before she went on the voyage?

Mr. Long: Before she went on the voyage the repairs were \$22,000 and after she came back they were \$2,000.

The Court: Well, you have it in.

Cross-examination.

By Mr. Conlen:

Q. How much did you pay for the vessel?

A. I refuse to answer.

Mr. Long: I don't think that is relevant.

The Court: The witness has answered the question.

Q. What was her condition when you purchased it?

A. She had been waterlogged.

Q. How long had she been in the water, how long had she been a wreck before you got her?

A. I suppose four months.

Q. Was she under water in Cape Fear?

A. No.

Q. How did she become a wreck?

A. In a hurricane.

Q. Off Cape Fear?

A. In the ocean. A tug boat picked her up or steamer picked her up and towed her in there.

Q. How far out in the ocean was she?

A. I didn't have anything to do with it until I bought her.

Q. You had her towed around here to Philadelphia?

A. Yes.

Q. And then you had repairs made you say in Philadelphia; how long was she here in Philadelphia before you had her repaired?

A. I suppose eight months.

Q. Where was she lying here in Philadelphia?

A. At 4 different places.

Q. Where were they?

A. Cooper's Point, two places, Kaighn's Point and Hanover Street.

Q. Was she under water at any time when she was here?

A. No.

Q. When she was waterlogged?

A. No, sir, not here.

Q. You say her bottom was fixed when she was here, the first repair; what was done to her bottom?

A. She was re-treenailed from her keel to her deck, which includes her bottom.

Q. Was she badly hogged?

A. She had been badly hogged since she was four years old. She had a reputation of being badly hogged. When she was built she wasn't properly fastened, and when she was four years old she was

badly hogged. After that she was fastened and held, and has been a good vessel ever since.

Q. When you say she wasn't well fastened —

A. When she was built.

Q. Where wasn't she fastened properly?

A. Newburyport.

Q. I say —

A. I say she wasn't properly fastened.

Q. I say where in the vessel was she not properly fastened?

A. Not anywhere.

Q. And you had her properly fastened?

A. Yes, and the people ahead of me had her properly fastened, but she went twenty years badly hogged and went all over the world and carried dry and perishable cargoes.

Q. Finally went under in a hurricane?

A. Yes, as lots more of them have done.

Q. When she came back you say she had worked both ends?

A. Yes.

Q. You mean the bow and the stern?

A. Yes.

Q. And she had worked the fastenings that she had?

A. Yes.

Q. How many of the fastenings were new, how many had been put in when you had her first repaired?

A. I didn't count them.

Q. About how many?

A. I couldn't say.

Q. About what percentage?

A. Every frame. You can count it.

Q. I say about what percentage?

A. Every frame and every plank.

Q. How many would that be?

A. I don't know.

Q. How many of the new breast hooks you put in after she came back on the second trip went to supply old breast hooks that were in her?

A. Two.

Q. They were where?

A. Forward.

Q. Up close in the bow, were they not?

A. Yes.

Q. You say you never saw these turnbuckles placed before in a vessel?

A. Never.

Q. And you say you don't think they contribute anything to the vessel?

A. I don't think they did in this case.

Q. And you say they were put in there by you?

A. Yes.

Q. And you had a lot of experience in building boats?

A. Yes.

Q. What experience had you had in the shipyard by the way—what experience, you say you worked for 16 years; was it in a shipyard for 7 years?

A. I have attended to repairs of our own vessels for 19 years.

Q. The 7 years you were in a shipyard, what were you doing?

A. That don't count.

Q. Let it count; just tell me what you were doing there?

A. I made out the bills, took the time, and was generally around the work.

Q. You were a clerk in a shipyard?

A. Generally about the work.

Q. You had nothing to do with building ships?

A. Of course not. I was a boy.

Q. Did you ever in your life have anything to do with the building or repairing of a ship other than as making arrangements to have it done?

A. Yes.

Q. What was it?

A. I have looked after other people's repairs. They engaged me to look after them.

Q. How would you go look after it, by ordering it done by a shipyard?

A. Of course.

Q. You relied on Captain Fisher to see that these repairs were all right, did you not?

A. I had to in order to get my class.

Q. You knew that Captain Fisher did not order these turnbuckles in?

A. Yes.

Q. And yet you went there and ordered them in?

A. I didn't think it would do her any harm, but it did.

Q. You thought it would not do her harm?

A. Yes.

Q. And yet you ordered them in the second time after finding out they did her harm?

A. Because they weren't put in properly.

Q. That was another whim, was it not; when did you houseclean and throw away this log book?

A. About immediately,—no, last fall.

Q. How long after this suit was started?

A. Last fall.

Q. That was the fall of 1916?

A. Yes.

Q. Where was it at the time you threw it away?

A. I had about 15 or 20 of them on top of my safe.

Q. And you looked at all of the 15, did you?

A. I said, "There is a bunch of log books that

are no good. Throw them away."

Q. And you knew this suit was pending?

A. Yes.

Q. And you knew the suit was up before the fall of 1916, and you had it continued because the captain was away?

A. I knew the copy of the log book was in the extension of the protest.

Q. Answer me; you knew that this suit was up before this Court and at your request it was continued because your captain was away?

A. That is right.

Q. When did you get the log book from the captain?

A. At the time he arrived here with the cargo of bones.

Q. You took the log book off the schooner, and kept it on top of the safe and furnished a new log book for the schooner?

A. Yes.

Q. Why did you do that?

A. That went up to the notary public.

Q. It was brought back from the notary public, was it not?

A. There wouldn't be half enough to make a voyage in the rest of that log book.

Q. And you destroyed it?

A. Yes, with 15 or 20 others.

Q. Where was it thrown; where were those 15 or 20 others thrown?

A. Given to some boys with a bag, to go up and sell them with old paper, with a lot of old logs.

Q. Do you know it was reported in Lloyds that the schooner "John Twohy," Rosario, American schooner, October 19th, cargo delivered in bad condition, salt water, damaged 100,000 feet of boards;

surveyors report the estimated loss at 16 per cent., which can be settled at 20 per cent.; can't make better offer. Do you know anything about that?

Mr. Long: I object to that question and move that it be stricken from the record.

Mr. Conlen: He was examining in chief as to whether he heard of any claim.

The Witness: I didn't know. I never heard of it.

Q. The captain never reported it to you?

A. No.

Q. Never heard of any claim?

A. No.

Q. Never any subject of any 20 per cent.?

A. No.

Q. Why was it this lumber was not all delivered at one time down in Rosario?

A. Never heard but what it was all delivered at one time.

Q. Did you never hear it was damaged?

A. No.

Q. Never heard that the vessel leaked on that voyage going down?

A. Yes.

Q. You heard that?

A. Yes.

Q. How much did the vessel leak on that voyage going down?

A. The captain will answer that. I don't know. I wasn't aboard.

Q. What did the captain report to you?

A. The vessel leaked.

Q. How much of a leak?

A. Didn't report how much.

Q. Did you look at the log book when the captain brought it back to see?

A. No.

Q. The log book showed, didn't it?

A. I don't know. I didn't look at it.

Q. The fact is the vessel leaked?

A. I don't know.

Q. You don't know anything about that?

A. I know it leaked. I don't know how much.

Q. You never even looked in the log book to see how much it leaked?

A. No. She got there and got back. That is all I was interested in.

Q. That is all you care, so it went down to South America and got back again?

A. Yes.

Q. You didn't care whether the lumber was damaged or not, answer that?

A. I decline.

JOHN FORSYTH, having been duly sworn, was examined and testified as follows:

By Mr. Long:

Q. How old are you and what is your occupation?

A. 59; master mariner.

Q. How long have you been a master mariner?

A. About 7 years.

Q. Prior to that, what position did you hold on the vessel?

A. Chief officer.

Q. What class of vessels have you served on as an officer and master?

A. As master I sailed for George F. Sprout and E. C. Moore.

Q. And the "John Twohy"?

A. Yes.

Q. What vessels have you served on as chief officer, many or few?

A. Pretty much all the biggest ships that sailed out of the country.

Mr. Conlen: I admit that the captain is a mariner.

Q. What oceans have you sailed?

(Objected to.)

The Witness: I guess every one of them.

Q. What experience have you had in the South American trade, the River Plata trade?

A. I have been down to Buenos Aires I guess about 12 or 14 times.

Q. In sailing vessels?

A. In sailing vessels.

Q. You were captain of the "John Twohy" when she made this trip to Rosario with lumber and came back with bones?

A. Yes.

Q. You don't own any interest in the "John Twohy," do you?

A. No.

Q. Merely a master?

A. Yes.

Q. In addition to making the trip in the "John Twohy" with a cargo of lumber and bones, you have been down to South America and over to Dover and back again?

A. Yes.

Q. In the John Twohy?

A. Yes.

Q. What was the condition of the "John Twohy" when she sailed away with a cargo of lumber on the voyage from which she returned with bones, what was her condition as to being tight, staunch, and seaworthy?

A. If I didn't think she was seaworthy I wouldn't have went with her.

Q. Was she?

A. She was in my judgment.

Q. In the loading of the cargo of bones, where were they loaded?

A. The bones were dumped down the three hatches, —laid alongside of the wharf, and they brought the bones across the street in baskets and dumped them down the three hatches. They were all in bulk all over the ship.

Q. Did you have anything to do with the weighing of these bones?

A. None whatever.

Q. Were you present when they were weighed?

A. No.

Q. Do you know where they were weighed?

A. They were weighed right in the yard.

Q. But you had nothing to do with that?

A. Nothing to do whatever.

Q. Did the ship have anybody there looking after the weighing of these bones?

A. No.

Q. Was it customary for the ship carrying these bones to have anybody looking after the weighing?

(Objected to.)

The Witness: Yes, it is customary for them to weigh bones and load the ship.

Q. Is it customary for the ship to have anybody by loading her, looking after the weighing?

A. No.

Q. Where did you get the figures which were put into the bill of lading in this case as to the quantity of bones which were loaded; who put the figures in the bill of lading in this case?

A. They put them in themselves.

Q. Did you have anything to do with that?

A. Nothing whatever.

Q. You accepted their figures, did you?

A. Yes.

Q. And assumed they were correct?

A. Assumed they were correct.

Q. When you got down to Buenos Aires, what did you do in reference to one of the turnbuckle rods that was in your ship?

A. After I left Philadelphia here, a little while after I was out, I found out this turnbuckle was out.—leaking. I arrived at Buenos Aires and was towed up the river, and got a quick dispatch in the river, and towed down again to load the bones, and when the vessel got down low enough so I could take that turnbuckle out, I backed it out, and drove white pine plugs in the hole and made it tight. That is as far as that hole was concerned.

Q. What if anything did that turnbuckle contribute to the strength of the bow of that vessel?

A. I couldn't tell you. The thing is that if I thought the turnbuckle was really necessary there, I should have got the ship carpenters in Buenos Aires to put another one there, so I took it out and plugged the holes up with wooden plugs.

Q. After you left Buenos Aires, what sort of weather did you experience?

A. I had—as near as I can remember from the first 8 or 9 days out, I got moderate weather with easterly wind. Then the wind hauled around to the northeast, which brought me by the wind, close by the wind, on part tack. My course was east, but I was making a little southern.

Q. Why was your course east?

A. My course is east to bring me out far enough east to get around Cape St. Roque.

Q. That is Brazil?

A. Yes. When I got this gale of wind, northeast came after this, right moderate easterly spell, which put me a little more to the southern in the mouth of the river. The wind jumped around at the southwest, and here I was plunging into this northeast sea, and then when the sea commenced to run with the wind, I saw that it was too much, and I laid her off a little more to the northward, more to bring the wind and sea right into the stern of the vessel,—ease her up.

Q. Was this a heavy gale or light gale of wind, this northeast gale?

A. There was nothing light at all about it. I think I was running under a reefed foresail and mainsail.

Q. For how long?

A. I think about 10 or 12 hours if I am not mistaken.

Q. Did you ship any water on your decks?

A. The decks were continually full all the time.

Q. Was there any time when the cabin was flooded?

A. That was the time I was running off before the wind. I took in the mainsail and the foresail was on and the topsail—when it commenced to lighten,

then there was enough sail on her to carry her clear of the sea, and the sea came up and struck the stern and the cabin doors being down, down it went.

Q. Flooded your cabin?

A. Flooded the cabin, yes.

Q. When your vessel was in this sea, what effect did the sea have on her; so far as causing her to labor or roll?

A. It is the sea that does the damage. The wind don't do the damage to the vessel. It is not the wind that causes the damage to any ship. It is always the sea.

Q. Was there any damage done to this ship by this sea?

A. Yes, by the sea the vessel was caused to labor and roll and strain, which caused her to leak.

Q. Were you able to keep this leak down by the use of your pumps?

A. Oh, yes.

Q. After that gale of wind, was there any time that your vessel stopped leaking or did she leak from that time?

A. She leaked more or less all the way home, but of course she never leaked as much in fine weather as she did in bad, and she commenced rolling and tumbling around.

Q. I want you to refer to this copy of the protest and tell me whether or not this was taken from your log book?

A. As near as I can judge that's it. I couldn't swear to it.

Q. After your arrival in the capes of the Delaware, did you experience any heavy weather?

A. No, sir, not after I arrived in the capes. I experienced on the night of the 26th a heavy gale.

Q. The 26th of what?

A. The 26th of December.

Q. What kind of weather was that?

A. It was a very heavy norther. At first it came running up southwest, tacked around into the southeast, and 2 o'clock that morning it came out northwest, like a shot out of a gun, down here off winter quarter shore.

Q. What force would you say the wind was?

A. When I got in they told me it was reported on the breakwater 72 miles an hour. I don't know whether that is a fact, though.

Q. Is that a hurricane or not?

A. Pretty hard to say. I never was in a hurricane, but this one blew hard enough for me, cuts the tops of the seas off.

Q. What sort of seas did you have?

A. That's it, it blew so hard that it didn't have time—it cut the tops right off.

By the Court:

Q. Flattened it out, ironed it out?

A. Yes.

By Mr. Long:

Q. After the wind let up, what sort of a sea did you have?

A. Didn't get much sea, because the wind was right off the land, close into the land.

Q. How would you describe this voyage which you made from Buenos Aires up to Philadelphia with this cargo of bones?

A. About the usual thing. I suppose you would have about 80 per cent. fine weather and the rest bad, 20 per cent. bad.

Q. Was there anything unusual in this trip so far

as the weather you experienced and the sea you experienced?

A. This northeast gale that I got, after I first left the river, that is something unusual. You don't very often get such a heavy gale in such a tremendous sea from the northeast, but the gale from the southwest, you have got to expect that, you always do.

Q. That is the one you got when you got near the coast?

A. No, that is the one I got leaving the river, and of course coming down in the winter time, in December, you expect all kinds of weather.

Q. Have you brought other cargoes of bones from Buenos Aires?

A. I think about 7 or 8 cargoes.

Q. What has been your experience with these cargoes as to their being any different between what you load and what you deliver?

A. All vessels that ever came from the river that I ever was in always run short.

Q. Why is that?

A. The only thing I can account for it is the drying out. They are lying down there in Buenos Aires exposed to the air, the same as they are here, in boards, if it rains, or in fact they might not go to work at 8 o'clock in the morning, but at noon they go to work.

Q. And put them in the vessel in a wet condition?

A. Yes.

Q. After your cargo was loaded your hatches were battened down, were they?

A. Yes.

Q. Was there any time after that that those hatches were removed until you arrived at your destination here in Philadelphia?

A. I don't think so.

Q. Did you make any stops between Buenos Aires and Philadelphia?

A. Yes, I went into Barbadoes for stores.

Q. Was there any cargo taken out of your vessel at any of these places?

A. No, they don't want them things, those bones, in Barbadoes.

Q. Some of these bones were in bags, were they not?

A. Those bones were in bags. I gave them permission to put those bones in bags. As near as I understand the charter party read that she was to get so much per ton for those bones, and she was to be paid for a certain amount of bones, and when she got there, and the bone people, Mr. Turner and the other man in the office, came down and looked at the ship —

Q. Who were they from?

A. They were from Duches'—they were afraid, very much afraid that they couldn't get the amount of bones into the ship that they had agreed—they were supposed to pay for so many tons, whether the ship took them or not. When they went down to look at the ship they were afraid they wouldn't get them in, so I told them—forward in the ship is our chain locker, and I had the hatches over there, and I told them they could put bones in bags in this place. Then they wouldn't run down on the chain, so that is the reason the bones were in bags.

Q. Were those bags tampered with at all?

A. No. When I was out in Buenos Aires the last voyage, I was in the office and Mr. Turner wanted to charter me again, and they had this lawsuit on.

Q. Tell me whether or not you actually delivered all the cargo that was loaded into your vessel on this voyage with the bones? -

A. Why, yes, all that came into the ship was delivered.

Q. You are positive about that, are you?

A. Oh, just as sure as —

Q. Did you see the damage to these bones by water?

A. I see wet bones in the hold and I see wet bones all day long when she was discharging.

Q. Did you ever see wet bones before in a vessel?

A. Yes.

Q. Is there anything unusual about this in a voyage?

A. No. If a vessel leaks and water gets on the skin, it is going to wet the bones.

Q. Was there any time during this voyage that your pumps could not keep your vessel free?

A. No.

By the Court:

Q. What do you mean by keeping her free?

By Mr. Long:

Q. Keeping her free of water?

A. No. If we couldn't have kept her free, we couldn't have got her here.

Q. I mean was there any time that you were not able to control the leak by the use of the pumps?

A. No.

Q. Could you keep that vessel pumped out by the use of pumps?

A. Wouldn't have got to Philadelphia if anything like that had happened.

Q. Could you keep her pumped out?

A. Oh, yes.

Q. How often did you pump her?

A. About every two hours after we discovered the leak, after we discovered the leak after this gale of wind, about every two hours.

Q. I understood you to say the first nine days you had no trouble whatever with the leak, it did not leak any during the first nine days?

A. There isn't a wooden ship afloat but what don't leak, we all know, everybody knows. When you hear a person say a wooden vessel is tight as a bottle, take it with a little bit of salt. They all leak more or less.

By the Court:

Q. According to this paper which you signed, you receipted for 287 bags?

A. Yes.

Q. According to the count made of what you delivered in Philadelphia, they had taken out 240 bags; did you have any count made of the number of bags you took aboard?

A. No, sir, but those bags had gotten down in the bow of the vessel, and the bags busted and the bones were running together, mised up. The whole bundle of old junk was picked up and hove on deck.

Q. Do you know how many bags burst in that way?

A. There were so many bags delivered, and those bags that were minus must have been the bags that were busted.

Q. That would make 47; do you imagine 47 bags busted?

A. There must have been.

Q. I don't see why they must have been?

A. If they were in the ship, because nobody would have handled those old bones.

Q. But if this fellow that put them aboard was paid by the quantity or weight put aboard, he may have been very liberal in his count and there may not have been 287 bags ever got on board your ship?

A. Yes, that might be so. Nobody tallied them.

Q. You didn't check them up?

A. No. It is not customary out there to check them. It is their own yard and their own foreman in the yard and they were supposed to be acting there for their own people.

Cross-examination.

By Mr. Conlen:

Q. The weighing was done in the yard?

A. Yes.

Q. How were the bones loaded,—in tubs, the way they were taken off?

A. No. In Buenos Aires, from the bone yard, the dock, like Delaware Avenue might be, about as far as from here to this wall,—the back of that is the bone yard. They have a little trolley track lying in the yard, and they have a little flat trolley, and the men will fill those baskets. This little trolley car is weighed in the morning with so many empty baskets. Then they will fill those empty baskets and put them on the trolley car, and run them down and put them on the scales, and each man will take a basket and carry it across the street and dump it down the hole.

Q. When you say "they" you mean the stevedores?

A. No, Duche's men.

Q. The stevedores loaded the vessel?

A. No, Duche himself, it is his boneyard. He has

a man there looks after that, and those men always work in the yard for Duche. The stevedore that—he is another man that Duche hires and pays by the ship.

Q. This man that is paid by the ship is in charge of the loading?

A. He is in charge of the loading of the ship, but appointed by the merchant, but paid by the ship.

Q. So that he has charge of this gang of men ——

A. No,—the yard man, Mr. Dunn.

Q. Who has the stevedore charge of?

A. The stevedore has charge of the men down the hole. About 6 or 8 men is all the men he has.

Q. You say it is the custom of the ship to weigh?

A. No, the ship never—no vessel I ever was in weighed bones or took any count of the bones at all.

Q. After you left Philadelphia on your first voyage of the "Twohy," did you experience any heavy weather?

A. Nothing unusual.

Q. The vessel leaked though, did she not?

A. As I was telling you before, all wooden vessels leak more or less.

By the Court :

Q. Did she leak ——

A. More or less, nothing unusual.

Q. Did she leak more than a wooden vessel or some age ordinarily leaks?

A. No.

By Mr. Conlen :

Q. Was there any damage to the cargo of lumber?

A. Not as I know of. I never hear of any lumber being damaged.

Q. Never had any trouble?

A. No. I went up when the lumber was delivered.

Q. How much water did you have at any time in the hold of that ship going down?

A. Going down to Buenos Aires?

Q. Yes.

A. I couldn't tell you, because for another thing I don't sound the pump.

Q. You never sounded the pump?

A. No. The mate, second mate, sounds the pump.

Q. Do you make the log entries?

A. No, the chief officer writes the log.

Q. Did you look at the log at any time during that voyage?

A. Usually once or twice a week I go in and see —

Q. At any time did you find there had been any water going down?

A. If there had been any water, making any amount of water, I should have noticed it, but I don't — we used to pump the vessel out going down night and morning.

Q. You did pump her out night and morning?

A. Yes.

Q. That was going down?

A. Yes.

Q. You never sounded her to find out —

A. Me personally, no—the second mate.

Q. Did you ever have a report made to you?

A. No, but I always instructed them and they have sense enough themselves to know that if the water is coming in any faster than it usually is, they will make a report.

Q. You say you had a northeast gale and that you very often do not get those kind of gales?

A. When is this?

Q. On the way back?

A. Oh, yes.

Q. But you do get, I have you down, as getting a northwest gale?

A. Yes.

Q. And you expect that southwest?

A. The northwester—when it gets into the northwest the first thing you know it jumps from the northwest to the southwest.

Q. And it is customary to have southwest gales in that season of the year at that point, is it not?

A. Yes, you will get southwest gales down there. You can look for them all times of the year, but of course there is more southwest wind down around the river from June, July, August and September.

Q. And this season of the year, that gale was unusual?

A. Which one?

Q. The one that you had, the northeast gale?

A. No, in October.

Q. It was not unusual?

A. This southwest gale in October?

Q. Yes.

A. That is very strong down there. No, it was not an unusual thing to get the southwest gale. You expect those things, you look for them.

Q. You talked about northeast gales you don't look for?

A. No.

Q. But they are about the same as the southwest gales, are they?

A. About the same as what our southwesterers are around here. You can reverse them and you have it down pretty near.

Q. There is such a thing in that locality as pamperos?

A. The pamperos, if you are coming home you are

all right, the pampero is just what you want,—give you a push along.

Q. But that is a very dangerous wind, is it not?

A. The trouble of it is—you see you get north-westerners down there. The thing you have to look out for is when they commence to jump. Here is one blowing to the northwest, the first thing you know it jumps into the southwest a matter of 8 points. Then you have to be on your guard, but after you get straightened up to this pampero, then you are all right.

Q. But this was not the force of the pampero, this was not the pampero?

A. Oh, no.

Q. Not anything like the force of that?

A. Oh, no. A pampero is like a northwest gale. There are pamperos and pamperos. Sometimes a pampero will blow —

Q. Sometimes it does not; you talked about drying out; was it raining at all at the time you were loading these bones?

A. There would be days there would be rain. You couldn't stay around there that season of the year with 20 or 30 days without rain.

Q. Will you tell me the fact as to whether during the time you were loading these bones, that it rained?

A. Yes. I can remember two or three days the foreman of the yard, Mr. Dunn, didn't go to work until noon, but it is too long ago now to tell you whether it rained hard or whether it poured.

Q. Were these bones covered from the rain?

A. No, they don't down there, they don't here in Philadelphia. They are all exposed in the open air.

Q. These bones that were put in bags were put in the bow of the vessel in the chain locker?

A. The reason those bones—the vessel was chartered for so much a ton, but should be paid, I think it was for 1200 tons. If she only had in 1100 tons, she had to be paid for 1200. Mr. Turner and the other young man down there came aboard and looked all over the vessel before we started and they were afraid they were not going to get this 1200 tons of bones into the ship. Me, to help them out, I said "Well, Mr. Turner, you can put bones in bags and you can get 5 or 10 ton of bones into this place over my chain."

Q. That was 5 or 10 additional tons that were put well up in the bow?

A. Yes, where they couldn't put bulk bones.

Q. Away up close forward?

A. Yes.

Q. How long were you at the Barbadoes?

A. I arrived in the Barbadoes on the 4th and left on the 5th. I arrived at Barbadoes 10 o'clock one morning and left at 4 the next.

Q. And the hatches were battened down all the way during the voyage and the only water that came in over the top of the vessel and got in was in this cabin?

A. Yes.

Q. And the cabin door was open at the time this wave happened to strike the vessel?

A. Exactly.

Q. During this voyage were any of the deck fittings torn away from the vessel? No damage was done to the deck fittings of the vessel, was there?

A. I don't remember. I don't think so.

Q. No life boats carried away or anything of that sort?

A. No.

Q. You said you pumped every two hours; did you pump any during the first nine days of the voyage?

A. Before we got this northeast gale?

Q. Yes.

A. Oh, yes, about the usual thing. We would be pumping going out night and morning.

Q. For how long?

A. Probably ten minutes.

Q. How much water will those pumps draw when they are working by the minute?

A. I don't know. I never figured that out, but somebody else probably could. They are 6 inch Worthington pumps.

Q. Coming back after these 9 days, how often did you work them; you worked them every two hours?

A. Every two hours we pumped her out.

Q. Did you pump her out oftener than that?

A. Oh, yes, we never let the water —

Q. For how long a time did you have your pumps working steadily?

A. I should judge probably three-quarters of an hour.

Q. That was the longest space of time at any time?

A. I think so, yes, but we never used to let it stand very long. I didn't want to let the water get too far up on the bones.

Q. You worked both pumps at once?

A. Once or twice, but usually one pump would keep her free. It wasn't necessary to keep two.

Q. You have told us that the vessel was leaking 6 inches per hour?

A. Yes, 6 inches per hour.

Q. Is that ordinary or extraordinary?

A. I think it is too much.

Q. How long did that continue?

A. From the time we got that northeast gale of

wind until—of course she always made lots of water after that, but she wouldn't make as much,—in moderate weather she wouldn't make as much as when she would get into a blow, tumbling and slapping around.

Q. Did you ever have any sounding made as to the amount of water in the hold?

A. Yes, after she sprung that leak, we sounded her pretty much all the time, always somebody with the sounding rod in their hand.

Q. What was the greatest amount of water you had?

A. It seems to me one time we had 5 feet.

Q. What was the lowest you had at any time?

A. The lowest, when the pump sucked, that would be 18 inches it seems to me.

Q. How long did the voyage take?

A. From Philadelphia back to Philadelphia?

Q. From Buenos Aires to Philadelphia?

A. I think 63 days, if I am not mistaken. I am not positive.

Q. About 63 days?

A. Yes.

Q. In that time you had 8 days of bad weather?

A. I should judge it was 8 or 9 days.

Q. That is about the usual percentage, I understand you to say?

A. Yes.

Q. That is what you expect to have, the same kind of weather you would expect to have always down there?

A. Yes.

Q. You had a usual voyage?

A. That was the usual thing, yes.

Re-direct examination.

By Mr. Long:

Q. When is it customary to pump out wooden vessels, how often?

A. We always make a practice to pump a vessel out, to try and pump night and morning, whether the vessel leaks or whether she does not leak.

Q. How much space did you have from the ceiling of your vessel down to the timbers; you said the pump sucked at 18 inches?

A. I should think, from the top of the timber down maybe 12 inches, wouldn't there?

Q. Yes.

A. But then you must remember, when you start one of those pumps, 6 inch pumps going, that it will pull the water away from there.

Q. I want you to take from the top of the ceiling down to the timbers, the distance from the top of the ceiling down to the timbers; how far is that?

A. The ceiling is 4 inches, isn't it?

Q. I don't know, I am asking you?

A. I think it is. I think the floor is 4 inch stuff. That would be 12 and 4 is 16, 16 inches.

Q. Wasn't the end of the pipe through which you pumped down below the top of the ceiling?

A. Yes.

Q. How much below?

A. I don't know,—4 or 5 inches, something like that, and when the pump is going, you know it pulls the water away, and you suck,—you know the vessel is going to —

Re-cross examination.

By Mr. Conlen:

Q. Did the pump suck any of this bone up?

A. Oh, no, there is no possible way that the bones could get into the pump.

Q. The bone dust?

A. Bone dust—I wouldn't vouch for that.

Q. That might have happened?

A. That might, yes.

Re-re-direct examination.

By Mr. Long:

Q. That is bone dust which gets down through the ceiling into the space between the timbers and the ceiling?

A. Yes, the bone dust that would probably sag down through between the planks.

I offer in evidence the certificate of the American Bureau of Shipping and the specifications which Captain Fisher referred to as the specifications which he prepared and which were followed in making the repairs to the schooner, and also this copy of the marine protest.

Mr. Conlen: I object to the offer of the protest. Except as showing that there is a protest, it is being offered as showing the log, and on its face it is only a copy in part, and we are entitled to have the whole log produced.

The Court: If the original cannot be produced, you have to be content with what can be produced.

Mr. Conlen: When they show it cannot be produced through no fault of theirs.

The Court: We will admit it subject to the objection.

(The certificate of the American Bureau of Shipping offered in evidence by respondent is as follows):

RESPONDENT'S EXHIBIT 1.

(Official Number of Vessel 76,952.)
(International Code Signal Letters K. J. N. R.)
Chartered 1862.

AMERICAN BUREAU OF SHIPPING.

And

AMERICAN LLOYDS
UNITED STATES OF AMERICA
CERTIFICATE OF CLASSIFICATION.

Duplicate

No. 16898.

New York, April 27th, 1917.

To all to whom these presents may come.

This certifies that the 4 Mast Schooner John Twohy of Philadelphia of 909-1020 tons, Register; with two decks built at Newburyport, Mass. in the year 1891 July. Oak, yellow pine, Iron Copper Fastening. Repairs, calked all over April 1915 whereof A. D. Cummins & Co. is owner. Was duly surveyed at the port of Camden, N. J. April, 1915, and has been entered in the Societies Register of

Shipping with the Class A.1½ for five (5) years, from April 1915. Subject to the conditions of its rules and requirements and is deemed seaworthy to carry dry and perishable cargo and is in conformity with the highest rating known to Maritime Commerce as promulgated in the standard requirements of this Bureau.

(Seal).

S. Taylor, of the Classification Committee.
M. S. McClelland, Chief Surveyor,
J. W. Cantillion, Secretary.

This certificate is granted with the understanding that the vessel be kept in good repair and be subject to the following surveys during the term assigned, failure to comply with which renders her class herein liable to be cancelled or withdrawn. Steel and iron vessels, first and second class to be surveyed within five years from launching and each four years thereafter. Third class, within four years from launching, and each three years thereafter. Wooden vessels, subject to examination once in two years; and half time survey if granted a term of seven years or over.

The surveyor must be called whenever the sheathing is being stripped or renewed or the vessel is caulked or repaired, to have same endorsed hereon.

In case of damage the vessel must be subject to a new survey.

THIS CERTIFIES THAT; the within named vessel "John Twohy" was on Dry Dock at Mobile, Ala. April 16th, 1917, and the following repairs were made; Bottom and top caulked, some refastening about topsides, rudder unhung and plade repaired and refastened, rudder port removed and renewed, mainmast spliced at hounds and rigging overhauled,

pumps overhauled and put in good condition, four strakes ceiling on port counter removed and renewed, two beam ends spliced and two lodging knees removed and renewed on port side aft, one set of 12"x12" pointers installed in after peak 'tween deck all steam and water pipes renewed, donkey boiler and engine overhauled, new fore, main and mizzen-sails, new forestaysail, and main topsail and other minor repairs.

Class confirmed and continued,
Mobile, Ala.

May 4th, 1917.

R. B. Sargent,
Surveyor.

(The specifications offered in evidence by respondent are as follows):

RESPONDENT'S EXHIBIT 2.

REPAIRS AND RENEWALS NECESSARY TO THE SCHOONER "JOHN TWOHY."

UPPER DECK AND POOP:

Renew—Buffalo on rail, port side from cathead forward.

Renew—About 10' Buffalo on rail, starboard side, from scarf to bowsprit.

Renew—About 20' mainrail on starboard side, from scarf to bowsprit.

Rewedge—Bowsprit.

Renew—Chock on bowsprit foot of jibboom.

Caulk—Forecastle deck, and wedge wood ends on fore-castle deck, forward.

Renew—Tripper on port cathead.

Renew—Forward house, same dimensions and material as before.

Renew—Waterway on port side between fore and main rigging, scarf to scarf.

Inner piece of waterway to be smoothed off and graving piece set in.

Anchor stock piece set in covering board.

Renew—Chock port side forward in waist.

Renew—Fifty-five (55) feet main rail, port side.

Renew—Thirty-six (36) feet Pin rail, port side.

Renew—Two sets of steps forward end of poop.

Replace—All decking on upper deck forward of poop, from butt to butt where necessary.

Thick pieces around mainmast to be put in place and refastened.

Renew—Top piece on port side of forward hatch coaming, and refasten and iron entire coaming.

Rail on starboard side from foremast to mainmast to be refastened. Scarf in rail to be put in place and refastened.

Renew—All waist on starboard side from foremast to mainmast, where necessary.

Wedge—All top timbers on upper deck forward of poop.

Renew—Amidships house where necessary, and refit and refasten as before.

Renew—Rail and waist on starboard side forward of spanker mast.

Renew—All channels in wake of rigging.

Renew—All decking on poop deck where necessary.

Refit—After house and cabin, inside and outside as before, work as agreed upon with owners.

Renew—All scuppers where necessary, after examination.

Bitt on port side of mizzen to be scarfed and pin rail refastened.

Chock on upper rail, forward end of poop to be refastened.

UPPER DECK AND POOP:

Renew—Two (2) fast bitts on port side aft.

Renew—Taffrail for 24 feet, aft.

Renew—Sixteen (16) feet rail on port side.

Renew—Box covering steering gear as before.

Refasten two (2) chocks aft.

Caulk—Topsides from lightwater to covering board on poop deck, and hawse with two (2) thread oakum, one thread to be reamed out if necessary.

All seams outside to be payed with paint.

Caulk—All decks except lower deck, inside of all houses and top of houses with two (2) thread oakum or cotton, owners option, all seams payed with pitch.

Caulk—Every seam above lightwater, outside or on deck or anywhere above decks.

All New work to have two (2) coats of paint, and all old work one (1) coat of paint.

Renew—All waste necessary on port side.

PORT SIDE: BETWEEN DECKS:

Ten (10) hanging knees to be refastened.

Reinforce two (2) hatch beams from knee to knee 10x12 yellow Pine.

Renew—Three (3) Carlins 5x8 Yellow Pine.

Renew—All stanchions under beams, that are missing and others to be put in place and refastened.

Renew—All decking where missing.

Renew—Two (2) Bosom knees forward.

Refasten upper breast hook knee.

Renew—Lodging piece on port side, after hatch.

Samson post to be put in proper place and refastened.

STARBOARD SIDE: BETWEEN DECKS:

Refasten sixteen (16) knees.

LOWER HOLD:

Scarf one (1) beam afterside forward hatch, on ends at knees, 12x12 Yellow Pine.

Renew—All stanchions under beams where necessary and all others refitted and refastened.

Renew—Eight (8) hanging knees, size and material as before.

Refasten keelsons and keel with 1¼" iron driven through and through, every 4' apart, length of bolts to be named later.

Rewedge all masts in partners.

Renew—All pump boxes.

Stem to be put back in proper place and refastened.

Refasten all wood ends.

Caulk—And refit all bow ports.

Lower piece on stern to be taken off filled in and renewed.

All hatches to be renewed; those on board to be sufficiently repaired.

BOTTOM:

Docked.

Renewed—Shoe where missing.

Refastened wood ends forward and aft with two 12" spikes in each.

Refastened all butts in bottom to lightwater with two 12" spikes in each.

Refastened bilges with locust treenails.

Renewed—All planking outside where necessary.

Refastened stem and sternpost.

New rudder stock and pintels where necessary.

Rudder casing caulked.

New lead sleeve.

Refastened keelsons with bolts driven through

into keel and garboard every five (5') feet entire length of vessel.

Caulked—From keel to covering board.

Cemented seams.

Copper painted bottom.

SPARS:

Renewed—Bowsprit.

All other spars overhauled and repaired where necessary.

All masts rewedged and examined around mast-heads.

New trestle-trees and cross-trees where necessary.

SAILS:

Renewed—All sails.

RIGGING:

New fore and mizzen rigging.

All head rigging such and stays and guys, etc., new.

All other standing rigging was in loft and overhauled.

All turnbuckles overhauled and renewed where necessary.

All running rigging renewed.

IRONWORK:

All chain plates taken off and renewed where necessary.

All other iron work such as shackles, etc., repaired.

Overhauled windlass.

BOILER AND ENGINE:

New Boiler.

New Engine.

All connections new.

Two new steam pumps with three hand pumps.

UPPER DECK:

Renewed deck where necessary.

Caulked deck where necessary.

All the necessary work on deck was done.

BETWEEN DECKS:

Reinforced waterway with a 9x12" then with a 12x12" entire length of vessel and edge bolted.

Renewed all knees where necessary, balance re-fastened. About half of the main renewed and the balance refastened.

Renewed all beams where necessary.

All hatch coamings in entire vessel either renewed or repaired.

All mast partners either renewed or repaired.

Written in lead pencil. Report of Repairs sent to American Bureau of Shipping for classification, Apr. 10, 1915.

Class recommended 5 years from April 1915 11½.

Written on back in lead pencil. April 10, 1915. Repairs completed. Str. John Twohy. Built 1891-7 at Newbury, Mass. About 24 years old at this time.

(The copy of the marine protest offered in evidence is as follows):

MARINE PROTEST.

No. 563. Printed and sold by John C. Clark Company 230 Dock Street, Philadelphia.

UNITED STATES OF AMERICA.

By this public instrument of protest, be it known and made manifest unto all whom it may concern, that on the seventh day of January in the year of our Lord one thousand nine hundred and sixteen before me, Charles S. Francis, a Notary Public for the Commonwealth of Pennsylvania, duly commissioned and sworn, residing in the City of Philadelphia, and by law authorized to administer Oaths and Affirmations, personally appeared John Forsyth, Master, F. C. Monsen, Mate, S. Forsyth, Boatswain, of and belonging to the Schooner or vessel called the

"John Twohy" of the port of Buenos Aires of the burthen of 908 tons, or thereabouts, and they, the said Appearers, having been by me, the said Notary Public, severally duly sworn according to law, did respectively declare and say, that they sailed in their several capacities aforesaid, on the twenty-first day of October, 1915, from the Port of Buenos Aires in and with the said vessel, she being then tight, staunch and strong, properly manned and provided with all necessary apparel, stores and provisions, and in every other respect well adapted for her intended voyage, and having on board cargo consisting of Bones, properly stowed and secured, bound for Philadelphia.

October 21st to October 29th Moderate winds, vessel proceeding on voyage, nothing unusual occurring.

October 30th. Fresh North East gale, with heavy swell. Took in light sails and spanker. 6 P. M. Reefed mizzen. Gale increasing, with heavy squalls, and nasty, confused sea. Vessel rolling and laboring heavily. At 10 P. M. took in more sails. Vessel rolling and laboring heavily. At 2 P. M. wind came out W. S. W. and heavy squalls. 8 A. M. weather more moderate; made sail. Noon, partly overcast. Wind, S. W. Vessel started to leak. Pumps carefully attended.

October 31st. Comes in partly over cast and weather clearing. At 4 P. M. put double reefs in mizzen, main and fore-sail. Blowing heavy with heavy confused sea. 7 P. M. Took in mizzen and jib and ran the vessel before the wind and sea. Decks continually full of water. Vessel rolling and laboring heavily. At 8 P. M. shipped sea flooding cabin. Vessel rolling heavily, and leaking badly. Midnight, gale increasing, with terrific squalls.

Vessel straining heavily. 2 A. M. Gale moderating. At 6 A. M. put vessel on her course. 8 A. M. Made sail. Noon, fine weather. Sea going down. Pumps carefully attended.

November 1st to December 20th. Vessel proceeding on voyage. Nothing unusual occurring.

December 20th. Weather over cast and threaten. Vessel leaking five inches per hour.

December 21st. Comes in over-cast sky and very light breeze. Moderate sea. Vessel leaking 6 ins. per hour. Over-cast sky and the breeze increasing. So ends this day. Lights carefully attended.

December 22nd. Comes in over-cast weather and strong breeze N. W. Sea increasing. Strong N. N. W. breeze. At 4 A. M. took in light sails and reefed the spanker. At 8 P. M. Strong gale from N. W. Took in spanker and reefed mizzen. Vessel rolling and straining heavily. Heavy sea.

December 23rd. Comes in with over-cast weather. Very light breeze. Sea going down; the vessel leaking 6 ins. per hour.

December 24th-25th. Nothing unusual occurring; vessel proceeding on voyage. Vessel leaking 6 ins. per hour.

December 26th. Comes in cloudy weather and S. S. W. breeze. 4 P. M. weather easy with fresh south breeze. At 6 P. M. wind increasing and took in top-sails and outer jib and spanker and reefed mizzen. At 8 P. M. Wind increasing to strong S. E. gale, with heavy sea and heavy rain. At midnight, strong S. E. gale. Took in fore-sail; at 2 A. M. wind came out N. W. with hurricane forces. 4 A. M. Vessel rolling and training heavily. 8 A. M. Gale and sea moderating. Wind and sea going down. Noon, clear weather.

December 27th. Gale moderating. Made sail. 11

A. M. passed Over Falls Light Ship. Pilot came aboard and proceeded up River to Philadelphia.

December 28th. 11 A. M. Made fast to Morris Street Wharf.

Pumps, lights and lookouts carefully and regularly attended to throughout the entire voyage.

The Master having previously, on the 20th day of December, 1915, noted his protest in the office of Koons, Wilson & Company, #420 Sansom St. Philadelphia, Pa., where the same remains on file.

That any losses, injury, or damage suffered or sustained by said vessel or her cargo, are entirely owing to the cause hereinbefore related, and not to any omission, neglect, or mis-management of the said Master, his Officers or Crew.

Wherefore these appearers now desire to protest, requiring an act thereof from me, the said Notary Public, to avail them when and where needful and necessary; and in testimony of the truth of the premises have hereunto respectively set their hands.

(Signed) John Forsyth, Master.

(Signed) F. C. Monsen, Mate,

(Signed) S. Forsyth, Boatwain.

Whereupon I, the said notary public, at the request aforesaid, have protested, and by these presents do protest, against the said causes and occurrences, for all and every loss and losses, injuries, damages, costs, charges, branches of charter party, or bills of lading, which have been or may be suffered or sustained thereby, that the same may be submitted unto, suffered and borne by them, to whom of right it doth, shall or may belong.

Thus done and protested by me, the said notary public, at the City of Philadelphia, the 7th of January, A. D. one thousand nine hundred and sixteen.

(Signed) CHARLES S. FRANCIS,

Quod Attestor,

UNITED STATES OF AMERICA.

STATE OF PENNSYLVANIA, }
CITY OF PHILADELPHIA, } ss.

I, CHARLES S. FRANCIS, of the City of Philadelphia, a notary public, duly commissioned and sworn, under the authority of the Commonwealth of Pennsylvania, DO HEREBY CERTIFY that the foregoing is a true copy of a certain instrument of protest made before me, by John Forsyth, the master of the schooner "John Twohy" of Buenos Aires, and by him and a portion of his crew duly subscribed and sworn to, the same having been carefully transcribed from and compared with the original instrument.

IN TESTIMONY WHEREOF, I have hereunto set my hand and notarial seal, in the City of Philadelphia, this seventh day of January, A. D. 1916.

MARINE PROTEST.

TESTIMONY CLOSED.

OPINION.

(Filed June 12, 1917)

Sur Trial Hearing on Libel, Answer and Proofs.

DICKINSON, J.

The respondent schooner was chartered to carry a cargo of bones from Buenos Aires to this port. The charter party contained the usual provisions as to the condition of the vessel. The freight earnings were based upon cargo tonnage. A dispute arose over the amount. This was adjusted by an agreement upon the deduction to be made from the out-turn weight because of the wet condition of a part of the cargo and a settlement made for the net out-turn weight thus determined. With this dispute the Court has nothing to do. The consignees then filed a libel against the vessel based upon the double claim of a failure to deliver part of the cargo loaded upon the vessel and the damaged condition of part of the cargo which was delivered. The in-take as evidenced by the statements of the bill of lading contrasted with the actual weight of the out-take shows on its face a net shortage of 149,069 lbs. The money sum claimed for short delivery is \$1,613.14. The money claim for damaged cargo is \$932.24 based upon a net weight of 327,102 lbs. of damaged bones, the loss of which is figured at \$5.70 per ton, of 2,000 lbs. The damage was due to salt water, and the damage claim is based upon the averred unseaworthiness of the vessel.

The defence is a denial of any shortage in the cargo in fact, and this in turn is based upon a fur-

ther denial of the correctness of the in-take weights. The damage to the cargo is attributed to a hazard of the sea, the consequences of which are excepted by the charter party. The entrance of seawater is averred to have been due to the opening of the seams of the vessel following strains to which she was subjected in the tempestuous weather which she encountered.

The bearing points of the controversy are thus seen to be two questions of fact. One is of the tonnage of the cargo, which in fact was put aboard the vessel. The other is whether the leaks were due to the condition of the vessel or were due to heavy weather conditions which would have caused a vessel of the stipulated seaworthiness to have sprung leaks to such an extent as to have caused the damage which was done. This latter fact question resolves itself into an inquiry into the character of the weather encountered on the voyage. The case for the plaintiff upon the first question consists wholly of the evidence of the quantity of bone taken on board which is supplied by the receipt given by the master of the vessel therefor. This evidence is not only *prima facie*, but may be characterized as strong *prima facie* evidence. There are several persuasive reasons for so holding. One is what may be termed a reason of convenience based upon the policy of the law to promote regularity and facilitate the transaction of business. Such evidence is further persuasive because it is in the nature of a confessing admission and such a paper has all the force of a self-disserving declaration by a party selfishly concerned not to make the admission unless the declaration speaks the truth. Moreover, the Act of Congress for the purpose of promoting the policy of the law spoken of commands the Courts to hold such documents to

"be *prima facie* evidence of the receipt of merchandise therein described." There is no reason, and no command, however, to regard such evidence as other than strong *prima facie* evidence resulting in putting upon the carrier the burden of proving the true state of the facts. The libellants in this case may in fairness be taken to have been the weigh-masters at the taking in and turning out ends of the voyage. If the master of the vessel delivers all the cargo which was taken on board, the only inference to be drawn from a discrepancy in the weights is that one or the other is incorrect. We make such fact finding in favor of the vessel. The testimony is direct and positive and there is no reason to suspect that all the bones put on board this vessel were not delivered to the consignee. There is not even a suggestion or insinuation otherwise. The libel as to this part of its claim is in consequence dismissed.

A like burden to prove exculpating facts is placed upon the vessel in its effort to relieve itself of the consequences of a portion of the cargo being damaged. The limitation of liability in the charter party is no broader than that incorporated in the Act of Congress. The fact to be found in a case such as the instant one is an inference fact. Knowing the cargo, the course and conditions of the voyage to be reasonably anticipated, is the damage which the cargo suffered one which would have been sustained if the vessel had been up to the standard of seaworthiness, or is it one which would have resulted notwithstanding the seaworthiness of the vessel? The respondent schooner is a wooden vessel. All wooden vessels leak and the proper standard of seaworthiness is not affected by this fact. None the less, if such vessels are in proper condition they will carry, and that without damage cargoes, such as that with which we are

concerned on such a voyage as that which we are investigating. Heavy weather and seas subject sailing vessels to severe strains which may result in their taking in water without this fact in any degree bearing testimony to their unseaworthiness. The springing of a leak, however, under some circumstances and other conditions of weather might very strongly evidence and point directly to the conclusion of unseaworthiness. The facts in any particular case are to be found from all the evidence and in this case the finding is in favor of the libellant, and against the respondent.

The foregoing conclusions lead to a degree sustaining the libel as filed for the sum of \$932.24, with an additional allowance for interest, and a further allowance to the libellant for its costs. The libellants having made an unsupported claim, might ordinarily be restricted to the claim of actual damages. The principle upon which such a ruling proceeds is not, however, applicable in the present case for two reasons. The libellants having a *prima facie* claim which has been disallowed for the shortage were within their rights in asserting such claim, and as a defence was interposed to that part of their claim which has been allowed, all the expense of a trial hearing has been necessarily incurred. No evidence was introduced to show that the respondents offered the libellants any other redress for the loss of that to which they are found to be entitled or that they had other recourse than to that of filing and proceeding with their libel to a ruling thereon.

The foregoing discussion resolves itself into the finding of two facts:

1. There was no shortage in fact in the tonnage of the cargo as received and discharged by the vessel.

2. A part of the cargo as discharged was damaged and this damage was done the cargo during the voyage and was due to the unseaworthiness of the vessel, she not being in the required and warranted condition of being staunch, tight and seaworthy. The money measure of this damage is \$932.24.

The earnestness with which the respective views of counsel were pressed at the argument calls for a further statement fortifying the conclusions already reached. A supporting authority to sustain the measure of the evidentiary value given to the bill of lading is found in the case of *James vs. Standard Oil*, 189 Fed. 719, Appeal Ruling, 191 Fed. 827. It is true that the legal effect of the bill of lading being in evidence is to impose upon the master the burden of making satisfactorily clear the correct weight of the cargo taken aboard and discharged by the vessel. It is not, however, an accurate statement to aver as was positively asserted at the argument that "there was no evidence to contradict" either the bill of lading weights or the out-turn weight figures. The evidence is clear and convincing that all of the cargo which was put aboard the vessel was received by the consignees. If this be the fact it is persuasive of the existence of an error in one or the other of the stated weights or of something occurring during the voyage affecting the weight of the cargo. It is frankly conceded that the cargo was not diminished through any human agency. It is admitted to be the fact that such a cargo under ordinary conditions will weigh less when discharged than when taken aboard. Such a discrepancy is looked for, but it would not be expected in a cargo of this size to exceed from 65,000 to 80,000 pounds, while the shortage as figured was substantially twice that. One of the experiences of

the voyage affecting the weight of the cargo was that a part of the cargo was wet. The portion thus affected was in the out-turn weight figured at 389,407 pounds. The weight of the water was likewise figured at 62,305 pounds. Deducting this added weight of water from the gross out-turn weights gives a net out-turn of 2,521,276 pounds, which deducted from the weight stated in the bill of lading of 2,670,345 pounds gives the estimated shortage of 149,069 pounds. It is thus seen that if the comparison is made between the gross out-turn weights and the bill of lading weights and allowance is made for the expected reduction in weight that the shortage entirely disappears. It is argued, however, that it is entirely proper to allow for the added weight of water in the wet part of the cargo because this weight is known to be there and it is not proper to allow for the ordinary reduction in weight, because this reduction is due to the bones drying out and that they did not in fact dry out under the conditions of this voyage and because of this no lightening of weights should be assumed and the discrepancy thereby becomes a real shortage. The significance of the fact that the cargo was undisturbed from the time it was shipped to the time it was discharged it is further argued is destroyed by the added fact that the vessel leaked and because of this the fine bone and soluble constituents of the bone was dissolved and pumped out with the water through the scuppers. This brings to the front a rather nice distinction. The libel voices two grounds of complaint. The one is a shortage in delivery. The other is damage to the cargo through its becoming wet owing to the unseaworthiness of the vessel. It is, of course, true that cargo taken aboard the vessel and pumped overboard is as much cargo undelivered as if it had been pitched

overboard or otherwise destroyed. At the same time the part of the cargo which had been dissolved by the action of the salt water and thus lost to the shipper would be included in any claim for damage made because of the cargo having become wet. It is, therefore, important to keep clear the distinction between a shortage in the cargo as such and a loss in bulk or weight of the cargo due to the damage from salt water lest the two claims be permitted to overlap, and in this way there be a double allowance of the damage claim. There only remains, therefore, to determine whether the shortage in weight is due in whole or in part to the sifting of the fine bone in the undamaged part of the cargo into the wet portion, thereby reducing the otherwise undamaged part of the cargo both in bulk and weight, or whether the difference between the in-take weights and out-turn weights is due to inaccuracy in one or both. We have positive and convincing evidence of the correctness of the out-turn weights. The in-take weights, however, are known to us only through and by the bill of lading. This evidence, though acceptable as legal evidence and though as already stated, fully in legal effect *prima facie* justifying a finding of its accuracy is nevertheless the kind of evidence whose force must yield to other evidence found to be persuasive of facts inconsistent with and contradictory of the accuracy of the weights given in the bill of lading. If these weights were inaccurate, the discrepancy is accounted for without troubling ourselves to find any other explanation of the shortage. Some light is thrown upon what is the real fact by the circumstance that a part of the bone was put in bags and the bags were counted and the number stated. When the cargo was discharged the bags were again counted and there was found not only the difference in weight

already mentioned but a difference in the count of the bags. There is a suggestion in the evidence as bearing upon this discrepancy in the count that some of the bags might have bursted or in fact some of them did burst, and the contents get among the loose bone, but this evidence was neither sufficiently definite, nor did it point to a sufficient number of broken bags to account for the difference between the number stated in the bill of lading to have been taken aboard and the count of the number of bags discharged. It being an admitted fact in the case that all the cargo which was taken aboard had been kept under hatches, battened down and undisturbed until the cargo was discharged and the accuracy of the out-turn weights and the out-turn count of bags not being questioned, the conclusion cannot be escaped that the in-take weights and count of bags as set forth in the bill of lading was inaccurate, and we have been unable to reach any conclusion of the extent to which it is inaccurate other than that measured by the difference between the in-take weights and the out-turn weights and the measure of the latter corrected by the analysis of the discharged cargo showing the extent to which the weight had been increased by the presence of water and decreased by the loss of the soluble constituents of the bone. Inasmuch as the latter as already stated has been figured into the damage loss it cannot again be allowed for as a delivery shortage. For this and other reasons we have reached the conclusion already stated that a finding of fact in favor of the respondent upon the shortage in delivery claim is the proper finding to be made.

Respecting the defence of hazards of the sea to the claim made for damages there is occasion to add little to what is set forth in the finding already made. Such a defence carries with it essentially the thought of

vis major. Seaworthiness, as fitness, is necessarily a relative term. So likewise are expressions descriptive of weather conditions and of sea. The respondent schooner, when she undertook this carriage, was a reclaimed wreck. This fact has a more or less important bearing upon the probabilities of the real cause of the damage to this cargo. We have not found in the evidence any suggestion even of the thought that had this vessel been really seaworthy she would nevertheless under the stress of weather, to which she was subjected, have taken in water to the extent to which she did take it in on this voyage. The only finding which the evidence justifies would be that of the two facts that she did encounter weather which might fairly be characterized as heavy and that she did leak so as to have at times five feet of water in her hold. The important fact is in the finding of whether she leaked not because of her unseaworthy condition, but because of the stress of weather and sea to which she was subjected, or in other words, did she spring a leak in spite of the fact that she was seaworthy. Hazards of the sea may cause any vessel to spring a leak, but vessels sometimes are in a condition in which they will leak, and, of course, they will leak under conditions of strain due to heavy weather. The difference is to some extent expressed between the two phrases, one that a leaky vessel encountered heavy weather, and the other that a vessel sprang a leak during and because of the heavy weather which she encountered.

The decree to be entered in accordance with the findings made is sufficiently indicated and a formal decree embodying the findings herein made may be submitted.

PETITION FOR REHEARING.

(Filed June 26, 1917)

To the Honorable the Judges of the said Court:

The petition of T. M. Duche & Sons (Buenos Aires), Ltd., the libellant above named, by its proctors, Conlen, Brinton & Acker, Esqs., respectfully represents:

1. That the above-entitled action is a cause of damages for breach of charter party of affreightment in which a libel was filed by your petitioners upon which process issued against the schooner "John Twohy" her tackle, etc. Service of process was accepted by proctor for the vessel, a claim was filed, stipulation entered, and an answer was filed by claimants.

2. That proofs were had in open court and upon pleadings and proof the cause was argued before your Honorable Court.

3. That in the libel filed by your petitioner, claim is made for non-delivery of a portion of the cargo loaded upon the said vessel at Buenos Aires and belonging to libellant, which said loss is alleged to have been due to the fault of the said vessel and its failure to perform, and comply with, the terms of the said contract of charter party.

4. That your Honorable Court in a decision filed on June 12th, 1917, found in accordance with certain of the allegations of the libel aforesaid, that:

"The in-take as evidenced by the statements of

the bill of lading contrasted with the actual weight of the out-take shows on its face a net shortage of 149,069 pounds."

"It is, of course, true that cargo taken aboard the vessel and pumped overboard is as much cargo undelivered as if it had been pitched overboard or otherwise destroyed."

5. Your Honorable Court further found that :

"If the master of the vessel delivers all the cargo which was taken on board, the only inference to be drawn from a discrepancy in the weights is that one or the other is incorrect.

"The testimony is direct and positive, and there is no reason to suspect that all the boxes put on board this vessel were not delivered to the consignee. There is not even a suggestion or insinuation otherwise.

"The evidence is clear and convincing that all of the cargo which was put aboard the vessel was received by the consignees. If this be the fact it is persuasive of the existence of an error in one or the other of the stated weights or of something occurring during the voyage affecting the weight of the cargo.

"Such a discrepancy is looked for, but it would not be expected in a cargo of this size to exceed from 65,000 to 80,000 pounds. . . .

"It is thus seen that if the comparison is made between the gross out-turn weights and the bill of lading weight, and allowance is made for the expected reduction in weight, that the shortage entirely disappears,"

and your Honorable Court in said opinion dismissed the libel as to the claim for non-delivery.

6. That at the hearing before your Honorable Court the question of the shortage in the cargo was not sufficiently argued by proctors for your said petitioner and certain facts in connection therewith were not made sufficiently clear or given their proper weight in the argument at such hearing, although the question was at the time before your Honorable Court for adjudication.

7. That your petitioner is informed and believes and therefore avers that inasmuch as it appears from the opinion of your Honorable Court that there was shortage in the delivery of the said cargo and that the said vessel was unseaworthy at the inception of the said voyage, that therefore the said vessel is liable for the damages suffered by your petitioner by reason of such short delivery, and your petitioner further believes and avers that the opinion of your Honorable Court dismissing the libel of your petitioner as to the claim for short delivery did not accord to your petitioner the benefit of its rights under the law civil and maritime and that by the dismissal of the said libel injustice has been done to your said petitioner.

8. That your petitioner believes that it should be given an opportunity to have the question of the liability of the schooner "John Twohy" to your petitioner on account of the short delivery fully argued and reheard before your Honorable Court, and thus give to your Honorable Court full and ample opportunity to examine the justice and merit of your petitioner's claim.

WHEREFORE, your petitioner prays your Honorable Court that it will decree that a rehearing may

be had before your Honorable Court in the above-entitled cause with respect to the question of the liability of the schooner "John Twohy" to your petitioner for the damages sustained by your petitioner by reason of the non-delivery of a portion of the said cargo, one of the subject-matters of the aforesaid action, meanwhile all proceedings to stay.

And it will ever pray, etc.

T. M. DUCHE & SONS (BUENOS AIRES), LTD.

By:

CONLEN, BRINTON & ACKER,
Proctors.

DECREE.

(Filed June 26, 1917)

And Now, to wit, this 26th day of June, A. D. 1917, upon consideration of the foregoing petition and on motion of Conlen, Brinton & Acker, Esqs., proctors for the petitioner, it is hereby ordered, adjudged and decreed that a rule be granted to show cause why a rehearing be not had in open court on the pleadings and proofs in the cause named in the foregoing petition, with reference to the liability of the schooner "John Twohy" to T. M. Duche & Sons (Buenos Aires), Ltd., for the damages suffered by the said T. M. Duche & Sons (Buenos Aires), Ltd., by reason of the non-delivery of a portion of the said cargo of the said schooner, one of the subject-matters of the cause named in the foregoing petition, returnable, meanwhile all proceedings to stay.

By the Court,
DICKINSON,
J.

ORDER OF COURT.

(Filed Nov. 8, 1917)

AND NOW, November 8th, 1917, re-argument refused.

By the Court,
DICKINSON,
Judge.

FINAL DECREE.

(Filed Apr. 16, 1918)

And Now, to wit, this 16th day of April, 1918, the above cause having been fully heard upon the pleadings and proofs, and having been argued by counsel, and due deliberation having been had, and it appearing to the Court that the damage to the cargo—as set forth in the libel filed herein—was due to the fault of the schooner “John Twohy.”

Now, therefore, it is hereby ordered, adjudged and decreed that T. M. Duche & Sons (Buenos Aires), Ltd., the libellant above named, recover of the schooner “John Twohy,” her tackle, apparel, furniture, &c.; and against Albert D. Cummins and Howard Compton, claimants of the said schooner, and their stipulators for value and costs, the sum of nine hundred and thirty-two dollars and twenty-four cents (\$932.24), together with interest thereon in the nature of damages from January 16th, 1916, to the date of this decree; and costs in the sum of one hundred and eight dollars and twenty-five cents (\$108.25).

By the Court.
(Attest) LEO A. LILLY,
Deputy Clerk.

ASSIGNMENTS OF ERROR.

(Filed Apr. 27, 1918)

Albert D. Cummins and Howard Compton, claimants-appellants herein, hereby assign error in the ruling, decision and final decree of the United States District Court for the Eastern District of Pennsylvania, on the following grounds:

1. In that the Court refused to dismiss the libel filed in the above case.
2. In that the Court entered decree allowing libellant to recover the sum of \$932.24 as damages together with interest thereon and costs.
3. In that the Court refused to find that the damages incurred by the cargo owned by libellant-appellees, was occasioned by a peril of the sea for which the claimants-appellants were not responsible nor legally liable.
4. In that the Court refused to find that the claimants-appellants' schooner "John Twohy" was strong, staunch and seaworthy at the time she sailed from the port where the cargo was delivered on her voyage to Philadelphia.

And the said claimants-appellants pray that the said decree may be reversed and they and each of them may be restored to all things which they or each of them have lost by reason of the same, and that they and each of them may have such other and further relief as may be just and equitable.

HOWARD M. LONG,

Proctor for Claimants-Appellants.

April 25, 1918.

PETITION FOR APPEAL.

(Filed Apr. 27, 1918)

To the Honorable Judges of said Court:

Petition of Albert D. Cummins and Howard Compton, claimants of the schooner "John Twohy" as she is proceeded against in the above case, respectfully represent;

1. That on the 11th day of February, 1916, libel was filed in this court by T. M. Duehe & Sons as owners of a cargo of bones against the schooner "John Twohy" to recover damages alleged to have been sustained by said cargo of bones which had been transported on board the said schooner from Buenos Aires, Argentine Republic, to Philadelphia, Penna. Your petitioners subsequently filed claim as owners of said schooner and also stipulation for value.

2. On April 16, 1918, a final decree was entered in this cause whereby it was ordered that the libellant recover of claimants the sum of \$932.24 as damages together with interest thereon from Jan. 16, 1916, to the date of this decree, together with costs in the sum of \$108.25.

3. Your petitioners believe that the said decree is erroneous and that injustice will be done if the same be carried into effect. Petitioner hereby prays for leave to appeal from said decree to the Circuit Court of Appeals for the Third Circuit.

HOWARD M. LONG,

*Proctor for Claimants-
Appellants.*

200 *Order Allowing Petition for Appeal*

EASTERN DISTRICT OF PENNSYLVANIA, ss.

HOWARD M. LONG, being duly sworn according to law, deposes and says that he is proctor for claimants in the foregoing petition, that he has read said petition, knows the contents thereof and that the same are true to the best of his knowledge and belief.

That the appeal from the final decree of the District Court is not taken for delay but because deponent believes that injustice will be done by the decree if carried into effect.

That the reason this verification is made by deponent and not by claimants is because the claimant Howard Compton is at present without this district and the claimant Albert D. Cummins is at present out of the country, beyond the seas.

HOWARD M. LONG.

Sworn to and subscribed before me this 27th day of April, A. D. 1918.

GEORGE BRODBECK,
Clerk District Court U. S., E. D. of Pa.

ORDER ALLOWING PETITION FOR APPEAL.

Before DICKINSON, J.

And Now, to Wit, this 27th day of April, A. D. 1918, Howard M. Long, proctor for claimants, comes into Court and prays for an appeal from the District Court of the United States for the Eastern District of Pennsylvania, to the next Circuit Court of Appeals of the United States for the Third Circuit. And thereupon appeal is allowed on the usual conditions.

By the Court.

(Attest) GEORGE BRODBECK,
Clerk.

STIPULATION OF COUNSEL.

(Filed Apr. 27, 1918)

It is hereby stipulated and agreed by and between the proctors for respective parties that the transcript of record sur appeal shall contain the following:

Docket entries

Libel

Answer to libel

Libellant's notes of testimony

Claimants' notes of testimony

Opinion of Court

Petition for rehearing

Libellant's final decree

Petition for appeal & order allowing appeal

Assignments of error

Stipulation of counsel

Certificate of Clerk

and no others.

It is further stipulated and agreed that no further bond shall be required of claimants-appellants on the appeal of this case since they have entered sufficient bond in the District Court for the Eastern District of Pennsylvania.

CONLEN, BRINTON & ACKER,
Proctors for Libellant-Appellee,
HOWARD M. LONG,
Proctor for Claimants-Appellants.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } SCT.

I, George Brodbeck, clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of as much of the pleas and proceedings in the case of T. M. Duche & Sons (Buenos Aires), Ltd., vs. American schooner "John Twohy" whereof John Forsyth now is or late was master, No. 10 of 1916, as per stipulation filed, a copy of which is hereto attached, the transcript of record in the above-entitled case is to include, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 3rd (Seal) day of June in the year of our Lord one thousand, nine hundred and eighteen and in the one hundred and forty-second year of the Independence of the United States.

GEORGE BRODBECK,
Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR
THE THIRD CIRCUIT.

*American Schooner "John
Twohy," et al.,*
Appellants,
v.
T. M. Duché & Sons,
Appellees.

October Term, 1918.
No. 2401 (List No. 19).

And afterwards, to wit, on the ninth day of December, 1918, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur motion by appellants to withdraw appeal, before the Hon. Joseph Buffington and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the tenth day of February, 1919, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR
THE THIRD CIRCUIT.

American Schooner "John Twohy"
(*Albert D. Cummins and Howard*
Compton, Claimants)

v.

T. M. Duché & Sons.

No.
October Term,
1918.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Before BUFFINGTON and WOOLLEY, *Circuit Judges.*

BUFFINGTON, J.

In the court below Duché & Sons filed their libel and obtained a decree against the Schooner "John Twohy" for some nine hundred dollars for injury to part of a cargo delivered, and some sixteen hundred dollars for short delivery. On hearing, that Court awarded the first item but denied the second. From this decree the schooner appealed to this Court. This appeal, under our case, "*The Canadia*," 241 Fed. Rep. 234, opened the whole subject-matter for reconsideration in this court and although the libellants had not appealed, they might, if the proofs so justified, have secured a more favorable decree. But in point of fact they did not appeal and the schooner, before the cause has been heard in this Court, has moved this Court for leave to withdraw its appeal, it paying the costs of such appeal. To the grant of this motion libellants object.

We find no reported case involving the precise question here raised. That the Schooner's appeal gave jurisdiction to this Court to consider the case *de novo* has, as we have seen by our own decision, been held by this Court. Having acquired such jurisdiction, it is

equally clear that jurisdiction can only be taken away by the Court's own action and, if the appellant desires to withdraw its appeal, it can only do so by the Court's order. The making of such order by the Court would therefore seem to be a matter of discretion on its part, unless such appeal has vested some right in the libellants, which right now precludes the exercise by this Court of the power to allow a dismissal of the appeal and forces it to decide it. After due consideration, we have reached the conclusion, first, that in a case involving the facts and procedure of the present one, this Court should not surrender that wholesome, discretionary control a Court should have over its own processes and procedure; and, second, that in the exercise of that discretionary power this motion should, under proper restriction, be allowed.

The reasons for such conclusion are, first, when the decree was entered in the Court below, the libellants had a right to appeal and thereby to have acquired the right to require the Appellate Court to proceed and decide the same. Second, this course the libellants did not follow, and having omitted to avail themselves of a course which would have given them a legal right to insist on having their appeal heard, they cannot now complain if this Court, in the exercise of its discretionary power, declines to decree them as a legal right that which by appropriate procedure they might have made such if they had so desired. Third, we feel the due administration of the admiralty will be furthered by the conclusion we have reached, for the allowance of the withdrawal of this appeal is in accord with the early principle, "agree with thine adversary quickly, whilst thou art in the way with him," which the law later embodied in its maxim, "*interest rei publicae ut sit finis litium.*"

We are all aware that under the smart of defeat quick appeals are sometimes taken which, on cooler judgment, would not have been taken. Why should not

there be a leeway for the exercise of that cooler judgment by a suitor? On the other hand, if it be understood that such appeal may be withdrawn, it will forewarn all parties who feel themselves aggrieved by a decree, to themselves appeal if they desire to prosecute their rights. Moreover, if it were held that an appeal once taken was irrevocable, and that, even if it subsequently appeared it was mistakenly taken, it could not be withdrawn, we can conceive of cases where appeals from real injustice would not dare to be taken because by such appeal the appellant was thereby committed to litigation beyond his power to stop.

But while the present is a case where we have discretionary power, we feel it should be exercised only under proper conditions. This case has been pending since 1916; the final decree was entered April 16, 1918; this appeal was taken April 27, 1918, and has resulted in nearly a year's delay, but for which the libellants would have been long since paid the amount which the appellant now impliedly concedes should have been so paid.

If, therefore, the appellant presents to the Clerk of this Court, within thirty days after notice to his counsel, of the filing of this opinion, a certificate that the sum decreed the libellants, with interest, has been paid, together with such costs as were adjudged against the Schooner in the Court below, and such printing cost as the respondent has incurred in preparation of this appeal, and shall also pay the costs of his appeal in this Court, then the motion for the withdrawal of this appeal will be allowed; otherwise it will be refused.

Endorsements:

2401

October Term, 1918.

Opinion of the Court,

by Buffington, J.

Received and Filed,

Feb. 10, 1919.

Saunders Lewis, Jr., Clerk.

Sur Motion for Leave to Withdraw Appeal 206a

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR
THE THIRD CIRCUIT.

*American Schooner "John
Twohy" (Albert D. Cum-
mins and Howard Comp-
lon, Claimants)*

v.

T. M. Ducké & Sons.

} October Term, 1918.
No.

SUR MOTION OF APPELLANT FOR LEAVE TO
WITHDRAW APPEAL.

AND NOW, to wit, this fourteenth day of March, A. D. 1919, the above motion having come on to be heard and having been argued by the Proctors for the respective parties, and the Court having, on to wit, the tenth day of February, 1919, filed an opinion wherein it was ordered that if the appellant, within thirty (30) days after notice to his counsel of the filing of said opinion, presents to the clerk a certificate that the sum decreed the libellants, with interest, has been paid, together with such costs as were adjudged against the schooner in the court below, and such printing costs as the respondent has incurred in preparation of this appeal and shall also pay the costs of his appeal in this court, then the motion for the withdrawal of this appeal will be allowed; otherwise it will be refused, and thereafter, the appellant having signified its willingness to abide by the holding of the Court and make payment of the money as therein provided,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the appeal be dismissed and that the decree of the District Court, in the above case, be affirmed, together with costs in this court, and that the appellee recover, in addition to the amount decreed it by the District Court, with interest to the date of this

206b Sur Motion for Leave to Withdraw Appeal

decree, its costs in this court and the sum of \$46.05, expended by appellee for printing its brief in this court. This order is agreed to by both counsel in the presence of the Court.

BY THE COURT.

BUFFINGTON, J.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *act.:*
THIRD JUDICIAL CIRCUIT,

I, SAUNDERS LEWIS, JR., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of

American Schooner "John Twohy" (Albert C. Cummins and Howard Compton, Claimants),

Appellants,

v.

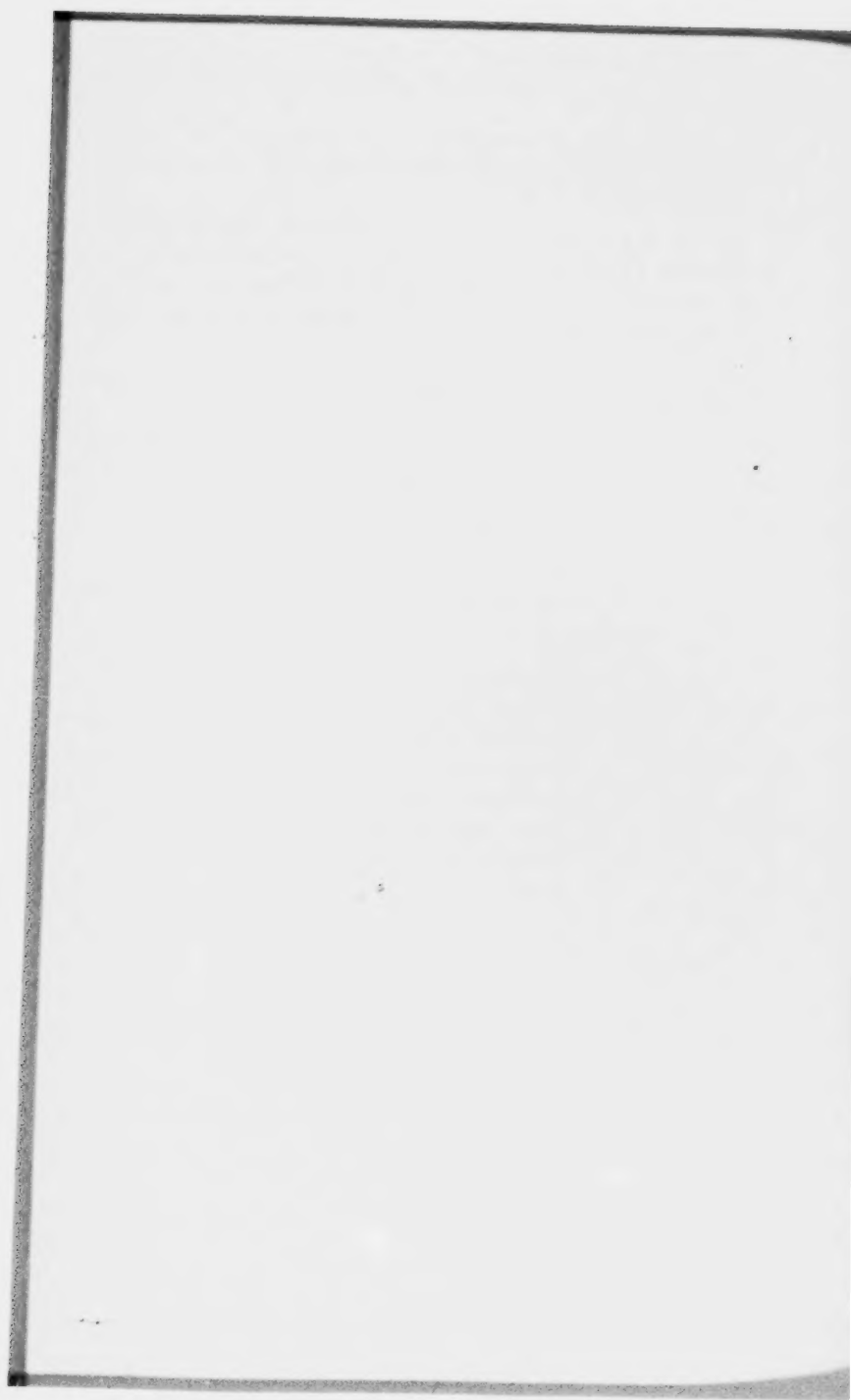
T. M. Ducké & Sons,

Appellees.

on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this fifteenth day of March, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-third.

SAUNDERS LEWIS, JR.,
of Appeals, Third Circuit.
of Appeals, Third Circuit.



UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which American Schooner "John Twohy", (Albert D. Cummins and Howard Compton, Claimants), are appellants, and T. M. Duche & Sons is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeen-day of April, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,029. Supreme Court of the United States, No. 943, October Term, 1918. T. M. Duche & Sons vs. American Schooner "John Twohy," etc. Writ of Certiorari. Received May 3, 1919. Saunders Lewis, Jr., Clerk.

In the Supreme Court of the United States of America, October Term, 1918.

No. 943.

T. M. DUCHE & SONS (Buenos Aires), LTD., Libellant, Petitioner,

vs.

AMERICAN SCHOONER "JOHN TWOHY," HER TACKLE, ETC., Respondent; (Albert D. Cummins and Howard Compton, Claimants), Respondents.

Stipulation of Counsel.

Whereas the Supreme Court of the United States of America, on, to-wit, the fourteenth day of April, A. D. 1919, granted the Petition filed in the above cause praying for the issuance of a Writ of Certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court said cause—and

Whereas said Writ of Certiorari has on, to-wit, the seventeenth day of April, A. D. 1919, been issued as prayed for and

Whereas a certified copy of the entire record in the above cause has heretofore, to-wit, upon the filing of said petition, been filed in the Supreme Court,

Now, therefore, it is hereby stipulated and agreed by and between Conlen, Brinton & Acker, Proctors for the Petitioner and Howard M. Long, Proctor for the Respondents, that the said certified record and proceedings in said cause heretofore filed in the Supreme Court of the United States as aforesaid be taken as having been so sent to and filed in said Court in obedience to the said Writ of Certiorari and that the same be in all respects treated and considered as the proper return by said Circuit Court of Appeals of the United States of America of the Third Circuit, to the said writ.

Witness our signatures in our own proper hands the 24th day of April, A. D. 1919.

CONLEN, BRINTON & ACKER,
Proctors for Petitioner.
HOWARD M. LONG,
Proctor for Respondent.

Endorsements: 2401. In the Supreme Court of the United States, No. 943, October Term, 1918. T. M. Duche & Sons (Buenos Aires), Ltd., Libellant, Petitioner, vs. American Schooner "John Twohy," her tackle, etc., Respondent, (Albert D. Cummins and Howard Compton, Claimants), Respondents. Stipulation of Counsel. Received & Filed May 3, 1919. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

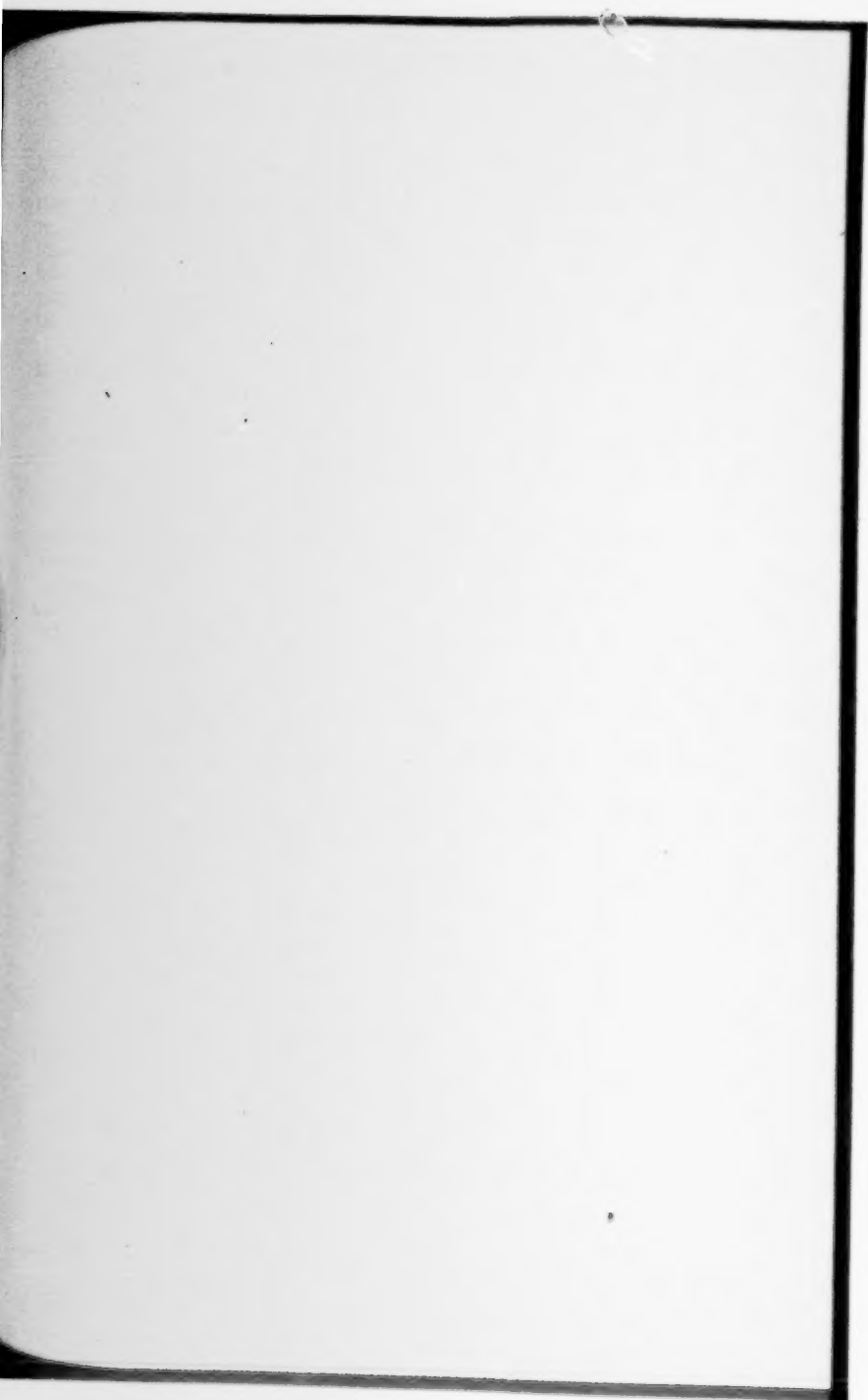
I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel to be used for the purpose of making return to the writ of certiorari issued from the Supreme Court of the United States in the case of: American Schooner "John Twohy", et al., Appellants, vs. F. M. Duche & Sons, Appellee. No. 2401, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this sixth day of May in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-third.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

[Endorsed:] File No. 27,029. Supreme Court U. S. October Term, 1918. Term No. 943. T. M. Duche & Sons, Petitioner, vs. American Schooner "John Twohy," etc. Writ of certiorari and return. Filed May 7, 1919.



U.S. District Court, S. D.
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Supreme Court of the United States

S. M. DICKER AND SONS (Steamship) LTD.,
Respondent,

Respondent **"JUNE TWENTY",** Her Tonnage, etc. (Albert
D. Davidson and Howard Company, Claimants).
Appellants.

**Petition for a Writ of Certiorari or in the
Alternative for a Writ of Habeas Corpus.**

**CONLEY, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,**
Attorneys for Respondents.

WILLIAM J. CONLEY,
Respondent.

Printed at the Court House, Washington.

IN THE
Supreme Court of the United States.

*In the Matter of the Petition of T. M. Duché & Sons
(Buenos Aires) Limited, for a Writ of Certiorari
Directed to the Circuit Court of Appeals of the
United States for the Third Circuit to Bring Be-
fore the Supreme Court the Case of*

T. M. DUCHÉ & SONS (BUENOS AIRES), LIMITED,
Libellant and Appellee,

AGAINST

THE AMERICAN SCHOONER "JOHN TWOHY," HER
TACKLE, ETC., RESPONDENT, ALBERT D. CUM-
MINS AND HOWARD COMPTON,
Claimants and Appellants,

OR

*in the Alternative for a Writ of Mandamus Directing
the Circuit Court of Appeals of the United States
for the Third Circuit to Dismiss the Motion Filed
by the Appellants Therein for Leave to Withdraw
Their Appeal and Requiring Said Circuit Court of
Appeals to Hear and Determine Said Cause on
Its Merits.*

AND now comes the Libellant-Appellee above
named, by Conlen, Brinton & Acker, and Harrington,
Bigham & Englar, its Proctors, and moves this court
upon a certified copy of the Transcript of the Rec-
ord herein, and upon the annexed petition sworn to the
seventh day of March, 1919, for a Writ of Certiorari
directed to the Circuit Court of Appeals of the United

States for the Third Circuit, to bring before this Honorable Court the case of T. M. Duché & Sons (Buenos Aires), Limited, Libellant-Appellee, against the American schooner "*John Twohy*," her tackle, etc., Respondent, Albert D. Cummins and Howard Compton, Claimants-Appellants, for such proceedings therein as to this court may seem just, or in the alternative, for a Writ of Mandamus, directing the Circuit Court of Appeals of the United States for the Third Circuit to dismiss the motion filed therein by the Appellants in the said cause for leave to withdraw their appeal, and to hear and determine said cause upon its merits; and your petitioner further moves this Honorable Court for such other and further relief in the premises as may be just.

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant-Appellee.

WILLIAM J. CONLEN,
Advocate.

IN THE SUPREME COURT OF THE UNITED STATES.

<i>T. M. Duché & Sons (Buenos Aires), Ltd.,</i>	}
Petitioner,	
v.	
<i>American Schooner "John Twohy," her tackle, etc. (Albert D. Cummins and Howard Compton, Claimants),</i>	
Respondent.	

PETITION FOR WRIT OF CERTIORARI OR IN
THE ALTERNATIVE FOR WRIT OF MAN-
DAMUS.

*To the Honorable the Supreme Court of the United
States of America:*

The petition of T. M. Duché & Sons (Buenos Aires), Ltd., for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit, to bring before the Supreme Court the case of T. M. Duché & Sons (Buenos Aires), Ltd., v. American Schooner "John Twohy," her tackle, etc. (Albert D. Cummins and Howard Compton, claimants) or in the alternative for a writ of mandamus directing said Circuit Court of Appeals for the Third Circuit to dismiss the motion filed therein by the claimants-appellants for leave to withdraw their appeal and requiring said Circuit Court of Appeals to hear and determine said cause upon its merits,

RESPECTFULLY SHOWS to this Honorable Court, as follows:

1. Your petitioner, T. M. Duché & Sons (Buenos Aires), Ltd., is a corporation organized and existing under the laws of the Republic of Argentina, having

its principal office and place of business in the City of Buenos Aires in said Republic. The schooner "John Twohy," at all times hereinafter mentioned, was an American schooner owned by Albert D. Cummins and Howard Compton, the claimants-appellants, having an office and place of business in Philadelphia, Pennsylvania.

2. On or about July 9, 1915, your petitioner chartered the said schooner for one voyage from Buenos Aires to Philadelphia to carry a full cargo of bones in bulk.

3. In the early part of October, 1915, said schooner reported at Buenos Aires to load the said cargo, which loading was completed on October 15, 1915, on which date the captain of the said schooner delivered to your petitioner a clean bill of lading, acknowledging without qualification the receipt of 1,210,000 kilos, the equivalent of 2,670,345 pounds avoirdupois, of bones.

4. On October 21, 1915, said vessel sailed from Buenos Aires bound for Philadelphia, but a few days after leaving port, without encountering more than ordinary weather, began to leak badly and continued so to do until after December 27, 1915, when she reached the port of Philadelphia, where she discharged her cargo beginning December 30, 1915, and ending on or about January 15, 1916.

5. Upon the discharge of the vessel it was found that 389,407 pounds of the bones were wet and badly damaged and that, in addition thereto, the schooner delivered 149,069 pounds short of the weight of the bones called for by the said bill of lading.

6. Thereafter, your petitioner claimed of the schooner and her owners the sum of \$932.24 for dam-

age to the part of the cargo delivered in bad condition, and \$1613.14 for loss arising from the short delivery. Upon the refusal of the schooner and her owners to pay this claim, or any part thereof, a libel was filed on behalf of your petitioner in the United States District Court for the Eastern District of Pennsylvania to recover the same.

7. After hearing in the said court the Honorable Oliver B. Dickinson, on June 12, 1917, filed an opinion in which he held that the said schooner was unseaworthy and allowed to the libellant its claim for damage to the injured portion of the bones in the sum of \$932.24, with costs, but refused, your petitioner contends erroneously, to allow libellant's claim in the sum of \$1613.14 arising out of the short delivery, on the ground, as stated by the Court, that the exact amount of shortage was not proved with absolute accuracy.

8. A final decree was entered on April 16, 1918, from which, on April 27, 1918, the claimants of the vessel appealed to the Circuit Court of Appeals of the United States for the Third Circuit.

9. In October, 1918, said appeal came on for argument in the said Circuit Court of Appeals, but was continued until November, at which time it was again called for argument and continued until the December sessions of the said court; both of said continuances being at the request of the appellants, the respondents here.

10. When the case was called for argument at the December sessions of the said Circuit Court of Appeals the appellants therein moved for leave to withdraw their appeal, which said motion was opposed by your petitioner on the grounds, *inter alia*:

First.—That to allow the withdrawal of the appeal at that time would, in effect be sanctioning the taking of an appeal for the purpose of delay.

Second.—That this appeal being in admiralty, the case was before the Circuit Court of Appeals de novo and your petitioner had the right to have the Circuit Court of Appeals pass upon the merits of its claim for short delivery, which had been disallowed in the District Court, which right was a valuable and substantial one, of which your petitioner should not be deprived without its consent, and

Third.—That inasmuch as more than six months had then elapsed since the said final decree had been entered in the District Court, the allowance of the motion to withdraw the appeal would leave your petitioner without remedy or means to obtain a trial de novo of its said claim in the Circuit Court of Appeals because the time limited for the taking of an appeal by your petitioner from the decree of the District Court had then expired.

11. On February 10, 1919, the said Circuit Court of Appeals, in an opinion by Judge Buffington, stating that the point had not been previously adjudged in any reported case, decided the same against the contention of your petitioner as follows, viz.:

“If, therefore, the appellant presents to the Clerk of this Court, within thirty days after notice to his counsel of the filing of this opinion, a certificate that the sum decreed the libellants, with interest, has been paid, together with such costs as were adjudged against the schooner in the Court below, and such printing cost as the respondent has incurred in preparation of this appeal, and

shall also pay the costs of his appeal in this Court, then the motion for the withdrawal of this appeal will be allowed; otherwise it will be refused."

12. Your petitioners are informed and believe, and therefore aver, that this holding of the said Circuit Court of Appeals is contrary to, and to a large extent nullifies the effect of the holding of this Court in the case of *Irvine v. "The Hesper,"* 122 U. S. 256, where this Court, speaking by Mr. Justice Blatchford, finally decided the status of an admiralty appeal as a trial de novo and said (p. 266):

"It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. *Yeaton v. United States*, 5 Cranch 281; *Anonymous*, 1 Gallison 22; 'The Roarer,' 1 Blatchford 1; 'The Saratoga' v. 438 Bales of Cotton, 1 Woods 75; 'The Lucille,' 19 Wall. 73; 'The Charles Morgan,' 115 U. S. 69, 75. *We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed they did so in view of the rule and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.*" (Italics ours.)

This holding of this Court has been followed by the various Federal Courts since the time of its rendition and may be taken as settled law. It has lately been emphatically reaffirmed by this Court in *Reid v. American Express Company*, 241 U. S. 544, at pp. 548-9, where his Honor, Mr. Chief Justice White, said:

"At the threshold it is insisted that the Court below had no authority to consider the case as before it for a new trial, that is, de novo, and to

award relief upon that theory, and that consequently it erred in reviewing the interlocutory decree which was not appealed from by which the Steamship Company was dismissed and allowed a recovery against that company, and also in reviewing both the interlocutory and final decrees so far as it was essential to grant relief to the Express Company because that company had not appealed. It is not denied that in the Second Circuit the right to a de novo trial was considered as settled by *Munson S. S. Line v. Miramar S. S. Co., Limited*, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a de novo trial in the court below authoritatively resulted from the ruling in *Irvine v. 'The Hesper'*, 122 U. S. 256, a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the *Miramar Case*. Entertaining this view, we do not stop to consider the various arguments which are here pressed upon our attention tending at least indirectly to establish the non-existence of the right to trial de novo in the court below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever."

13. Under these decisions the appeal in the present case brought it before the Circuit Court of Appeals for a hearing de novo wherein your petitioner was entitled to be heard, and have said Circuit Court of Appeals pass upon that part of its claim which had

been denied in the District Court. This right in your petitioner was a valuable and substantial one and one of which it should not be deprived over its protest and without its consent.

14. Under the decisions of the Federal Courts the withdrawal of an appeal is never a privilege which appellant can exercise as of right, but in any event is at least subject to the legal discretion of the appellate court, which discretion should not be exercised in cases where to do so would operate to deprive the appellee of any valuable right.

15. The point involved in this case has not, so far as a careful search of the decisions discloses, been heretofore determined or passed upon by any Federal Court, but in certain State Court cases has been decided in accordance with the contention of your petitioner in the Circuit Court of Appeals.

In *Peterson v. Frey*, 109 Mich. 689, in a case where the statute provided that on appeal the appellate court should "*become possessed of the case, the same as if it had been originally commenced in said appellate court,*" it was held that an appellant could not dismiss his appeal without the consent of the appellee.

In *Bingham v. Waterhouse*, 32 Texas 468, in a case where, under the statute, the appeal was a trial de novo, it was held that the appellant could not withdraw his appeal without the consent of the appellee.

In each of the above cited cases the appeal, as in the present case, had been taken by an unsuccessful defendant in the court below.

16. The questions and propositions of law involved in this case are substantially as follows:

I. Where a libellant in admiralty in a District Court recovers a part of his claim and is denied the

balance thereof, and the respondent appeals to the Circuit Court of Appeals, can the respondent-appellant thereafter, and after the expiration of the time limited for an appeal by the libellant, withdraw his appeal over the protest and without the consent of the appellee?

II. Under such facts it is within the legal discretion of the Circuit Court of Appeals to permit the appellant to withdraw its appeal over the appellee's protest and without its consent.

17. Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari, or in the alternative a writ of mandamus for the following reasons, among others, viz.:

I. Because the questions of law and practice involved herein have not been passed upon by this Court.

II. Because the public interest and the interest of jurisprudence require the decision of this Court upon the questions of law and practice involved herein.

III. Because the novelty of the point in issue, and its importance in the admiralty practice, requires that this Court pass upon and decide the same.

IV. Because the decision of the Circuit Court of Appeals in this cause is in conflict with the decisions of this Court in the cases of *Irvine v. "The Hesper"* and *Reid v. The American Express Company* above referred to.

V. Because the decision of the Circuit Court of Appeals in this cause, if allowed to stand, unreviewed by this Court, would tend to complicate the procedure in the admiralty courts, require much additional labor

and expense in admiralty causes, the filing of many additional documents and cross appeals, and would, in effect, nullify to a large extent the holding of this Court as set forth in *Irvine v. "The Hesper."*

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case directed to the Circuit Court of Appeals for the Third Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just, or, in the alternative, that this Honorable Court will be pleased to grant a writ of mandamus directing the said Circuit Court of Appeals for the Third Circuit to dismiss the motion filed therein by the claimants-appellants in this cause for leave to withdraw their appeal, and requiring said Circuit Court of Appeals for the Third Circuit to hear and determine said cause upon its merits.

T. M. DUCHÉ & SONS (Buenos Aires), LTD.

By its Attorneys:

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } ss.:

WILLIAM J. CONLEN, being duly sworn according to law, deposes and says that he is of counsel for T. M. Duché & Sons (Buenos Aires), Ltd., the above-named petitioner; that he has read the foregoing petition; that the same is true to the best of his knowledge, information and belief; that his knowledge is derived from the record in this case and from what has taken place in his presence and in court, and that the reason why this affidavit is not made by an officer of the petitioner

is that the said petitioner is an alien corporation and that it has no officers within this jurisdiction and there is not time to send this petition to the offices of the said petitioner in Buenos Aires for verification.

Sworn to and subscribed }
before me this 7th day } WILLIAM J. CONLEN,
of March, A. D. 1919.

JENNIE C. O'NEILL,

(Seal) *Notary Public.*

My commission expires March 10, 1921.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well-founded and the case is one in which the prayer of the petitioner should be granted by this Court.

WILLIAM J. CONLEN,
Proctor for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA.

*In the Matter of the Petition of T. M. Duché & Sons
(Buenos Aires) Limited, for a Writ of Certiorari
Directed to the Circuit Court of Appeals of the
United States for the Third Circuit to Bring Before
the Supreme Court the Case of*

T. M. DUCHÉ & SONS (BUENOS AIRES), LIMITED,
Libellant and Appellee,

AGAINST

THE AMERICAN SCHOONER "JOHN TWOHY," HER
TACKLE, ETC., RESPONDENT, ALBERT D. CUM-
MINS AND HOWARD COMPTON,
Claimants and Appellants,

OR

*in the Alternative for a Writ of Mandamus Directing
the Circuit Court of Appeals of the United States
for the Third Circuit to Dismiss the Motion Filed
by the Appellants Therein for Leave to Withdraw
Their Appeal and Requiring Said Circuit Court of
Appeals to Hear and Determine Said Cause on Its
Merits.*

Sir:

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of T. M. Duché & Sons (Buenos Aires), Ltd., sworn to the 7th day of March, 1918, we shall move the motion herewith annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 31st day of March, 1919, at the opening of Court on that

day or as soon thereafter as counsel can be heard, and we shall then and there move for such further relief in the premises as may be just.

Dated at Philadelphia, the 15th day of March, A. D. 1919.

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR.
Proctors for Petitioner.

1935 Commercial Trust Building,
Philadelphia, Penna.

ALBERT D. CUMMINS and HOWARD COMPTON,
Attorney for Respondent,
Land Title Building,
Philadelphia, Pa.

And ALBERT D. CUMMINS and HOWARD COMPTON,
Claimants,
Bullitt Building, Philadelphia, Pa.



IN THE
Supreme Court of the United States.

*In the Matter of the Petition of T. M. Duché & Sons
(Buenos Aires), Limited, for a Writ of Certiorari
Directed to the Circuit Court of Appeals for the
Third Circuit to Bring Before the Supreme Court
the Case of*

T. M. DUCHÉ & SONS (BUENOS AIRES), LIMITED,
Libellant and Appellee,

AGAINST

THE AMERICAN SCHOONER "JOHN TWOHY," HER
TACKLE, ETC., RESPONDENT, ALBERT D. CUM-
MINS AND HOWARD COMPTON,
Claimants and Appellants,

OR

*in the Alternative for a Writ of Mandamus Directing
the Circuit Court of Appeals of the United States
for the Third Circuit to Dismiss the Motion Filed
Therein by the Appellants, for Leave to Withdraw
Their Appeal and Requiring Said Circuit Court of
Appeals to Hear and Determine Said Cause on Its
Merits.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT
OF CERTIORARI OR IN THE ALTERNATIVE
FOR A WRIT OF MANDAMUS.

THE FACTS.

The facts in this case are as follows:

The schooner "John Twohy," warranted to be
"*tight, staunch, strong and in every way fitted for the*

intended voyage," was chartered by the claimants to the libellant to carry a full and complete cargo of bones from Buenos Aires to Philadelphia.

The "Twohy" was a reclaimed wreck. When she sailed from Philadelphia for South America to enter on the performance of this charter she had just undergone repairs after having lain in a badly wrecked condition for fifteen months. In the course of her outward voyage, it appeared that she was leaking, the extent of the leak and other conditions attending her outward voyage being unobtainable because of the destruction of her log by claimants after this suit was brought, but before hearing.

On October 21, 1915, having loaded a full cargo, the "Twohy" sailed from Buenos Aires bound for Philadelphia, where she arrived December 28, 1915, and discharged her cargo, a large part of which was found to be wet and damaged. In addition to delivering a part of the cargo in a damaged condition, the ship wholly failed to deliver 149,069 pounds of the bones called for by the bill of lading, which admitted without any qualification whatsoever, the receipt of 1,210,000 kilos, equivalent to 2,670,345 pounds.

The libel in this case set forth two claims: One for short delivery and the other for injury to part of the deliver cargo, both arising out of the unseaworthy condition of the ship.

It appeared that when the vessel was only about nine days out from Buenos Aires she encountered weather which was slightly rough, but not more severe than was to be expected at that time and place. During this rough weather she began to leak badly and continued to do so for the rest of the voyage, the leakage being at the rate of about six inches of water an hour, necessitating pumping every two hours, there being at one time as much as five feet of water in the hold.

The libellant contended that the loss and damage

was due to the unseaworthiness of the vessel, the claimants, defending, that it was due to perils of the sea within the exceptions of the charter party and bill of lading.

The Court below found the vessel unseaworthy and awarded libellant damages for the injury to the part of the cargo delivered, but on the ground that libellant's proof did not sufficiently demonstrate the amount of the short delivery, refused to award libellant any damages on account of that claim.

A final decree was entered on April 16, 1918, and on April 27, 1918, an appeal was taken by the claimants to the Circuit Court of Appeals of the Third Circuit.

This appeal came on for argument in October and November, 1918, and on each occasion was continued at the request of the appellants. It again came on in December, 1918, when the appellants, apparently convinced that no further continuances would be granted, moved for leave to withdraw their appeal.

This motion was opposed by the petitioner here, but on February 10, 1919, the Circuit Court of Appeals over the protest and without the consent of the petitioner, in an opinion by Judge Buffington (Rec., p.), granted the motion, provided the appellant paid the amount of the decree of the District Court with interest and costs within thirty days, which payment the appellant below—the respondent here—is apparently willing, and has offered, to make.

Following this opinion the present petition was filed praying for a writ of certiorari.

THE QUESTIONS OF LAW.

The questions of law presented by the situation in the court below and upon this petition are:

I. Where a libellant in admiralty recovers a part of his claim in the District Court, and is denied the balance thereof, and the respondent appeals to the Circuit

Court of Appeals, can the respondent-appellant thereafter, and after the expiration of the time limited for an appeal by the libellant, withdraw his appeal over the protest and without the consent of the libellant-appellee?

II. Under such facts is it within the legal discretion of the Circuit Court of Appeals to permit the appellant to withdraw its appeal over the appellee's objection and without its consent?

ARGUMENT.

Your petitioner submits that the writ prayed for should be granted for the reasons that the questions involved in the Circuit Court of Appeals were novel ones, of great importance in the Admiralty practice, not heretofore decided by this Court or any other Federal Court; that the decision of the Circuit Court of Appeals in this case is erroneous, tends to complicate the Admiralty practice, is contrary to and to a large extent nullifies important decisions of this Court of such long standing as to have become settled law, and if allowed to stand unreviewed and uncorrected by this Court will, in many cases, as it has in this, work the greatest injustice to suitors who act in reliance upon the decisions of this Court for the protection of their rights and the conduct of their litigation.

To fully realize the scope and effect of the ruling by the Circuit Court of Appeals in this case and to appreciate its practical application, it is necessary to consider the facts and issues presented in this case on the appeal to the Circuit Court of Appeals.

Two issues were raised in the District Court—*First*, the seaworthiness of the "*John Twohy*," and, *second*, the amount of the loss. The second issue had two branches: (a) Loss arising from damage to part of

the cargo delivered; (b) loss arising from short delivery.

The District Court found the vessel unseaworthy and awarded damages for injury to the cargo delivered, but denied recovery for the short delivery.

These issues were all so closely interwoven that it is necessary to consider them together.

With regard to the issue of seaworthiness in this case, four points must be borne in mind:

First.—The provision in the charter party that the vessel is “*tight, staunch, strong and in every way fitted for the intended voyage*” is an absolute warranty of seaworthiness even against latent defects.

The Edwin L. Morrison, 153 U. S. 199;

The Lockport, 197 Fed. 213;

The Caledonian, 42 Fed. 681.

Second.—The Harter Act, which is not mentioned in the charter, does not operate to relieve the owner or the vessel from liability for the consequences of unseaworthiness, even where it is proved that the owner exercised due diligence to make the vessel seaworthy. It is incumbent on the owner to provide a seaworthy vessel, unless *by contract* he limits his obligation to the exercise of due diligence to make her so.

The Carib Prince, 170 U. S. 655;

The Sandfield, 92 Fed. 663;

Farr & Bailey Co. v. International Navigation Co., 98 Fed. 636;

The Ninfa, 156 Fed. Rep. 512;

The Indrapura, 190 Fed. Rep. 711.

Third.—There is no provision in the charter party limiting the obligation of the owners to provide a sea-

worthy vessel or reducing their obligations in that connection to the exercise of due diligence to make the vessel seaworthy.

Fourth.—The burden of affirmatively proving the seaworthiness of the vessel at the time of loading the cargo, and at the commencement of the voyage, rests upon the ship owner.

International Navigation Co. v. Farr & Bailey Co., 181 U. S. 218;
The Wildcroft, 201 U. S. 378;
Bradley v. Lehigh Valley Co., 153 Fed. 350.

The "John Twohy" is an old schooner, which, when built in 1891, was not properly fastened and became badly hogged (Cummins, p. 145). In November, 1913, she was wrecked, and from that time until February, 1915, was lying in a wrecked condition at Southport, North Carolina, and at Philadelphia (Record, p. 27).

Between February and June, 1915, the "Twohy" was repaired and strengthened, and on June 18, 1915, sailed from Philadelphia for Rosario on the River Plate, where she arrived the early part of September (Record, p. 30). On her outward voyage she was found to be leaking, and at the conclusion thereof, the captain removed a turnbuckle rod which had been placed athwartships near her bow and plugged the holes, after which she proceeded to Buenos Aires to load the cargo of bones here involved (Record, p. 28).

Of the details of the outward voyage we have no information owing to the loss or destruction of the log of the vessel during the pendency of this action (Record, pp. 103, 148, 149).

The claimant produced a number of witnesses, all of whom swore that the turnbuckle rod was entirely un-

necessary, added nothing to the strength of the vessel, and had no effect on her strength whatsoever; the claimant himself passes off the presence of the turnbuckle rod as a "whim of mine" (Record, p. 143).

But after the discharge at Philadelphia of the cargo here in question—the turnbuckle rod that had been taken out was, by order of the claimant, put back in the vessel again, at exactly the same place from which it had been taken (Record, p. 148).

This fact alone is sufficient to impeach, if not utterly to discredit, the testimony that the turnbuckle rod was useless and unnecessary.

The true function which this rod did perform, and was in the vessel to perform, was to hold her together and strengthen her and the effect of taking it out was to let her settle back and loosen her seams (Mowatt, pp. 98, 99), *all of which were recaulked and recemented after she discharged her cargo at Philadelphia* (Record, p. 134).

The vessel left Buenos Aires for Philadelphia on October 21, 1915. On October 30th, the weather became a little heavy and continued so for a day and a half. This, however, was ordinary bad weather, nothing extraordinary or unexpected. The master stated that this voyage was "About the usual thing"—"You expect those things, you look for them."

The voyage consumed altogether sixty-nine days, out of which there were six days of bad weather—less than ten per cent. bad—whereas the master states (Forsyth, p. 157), that on the average voyage between Buenos Aires and Philadelphia at that season of the year the average weather would be about twenty per cent. bad—and (Forsyth, pp. 164-165, 167, 168), the bad weather experienced was nothing unusual—"just about the usual thing," "what you would expect"—"just what you look for."

The whole truth is that this vessel had an exceptionally good voyage, and had unusually good weather.

It is most important to notice that in the very first bad weather that this vessel encountered she began to leak very badly. The bad weather encountered after the first day therefore cannot be taken into consideration.

That the vessel could not stand even a few hours of an ordinary storm, not an unusual one, such as could be classed as a sea peril, but an ordinary usual storm such as was to be expected, anticipated and looked for—furnishes the most satisfactory evidence that she was not seaworthy at the inception of her voyage.

On this point the present case is squarely ruled by *Benner Line v. Pendleton*, 210 Fed. 67 (D. C., So. D. N. Y., 1913), affirmed in this particular, in the Circuit Court of Appeals of the Second Circuit, 217 Federal 497, which was in turn affirmed, on certiorari, by the Supreme Court, 246 U. S. 353 (1918), where the question of seaworthiness was disposed of by Mr. Justice Holmes, who said:

“The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage, and that by reason thereof she sank, and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side.”

In that case an action was brought against the owners of the schooner “Edith Olcott,” which three or four days after leaving port sank with all her cargo.

The owners of the vessel proved that she was carefully inspected, overhauled and put in order by a thoroughly competent man before the voyage. One of the experts who examined her reported that she was “in the pink of condition.” Witnesses testified that they

found her seams and butts in first-class order, as were her rigging, decks, waterways and chain plates; that she was "in first-class condition," "one of the finest vessels" the witness had ever seen, and "fit to go around Cape Horn in."

The superintendent of the Dry Dock Company testified that she was tight, staunch and strong. The inspector of the American Bureau of Shipping testified that the vessel was "first class," that she had been thoroughly examined for reclassification in 1905, and was given an A1 rating for six years—a rating which would have expired one year after she was lost. He stated that the "Edith Olcott" was "exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost," and that she had the highest rating ever given to a vessel of her age—having been built in 1890. The evidence given by other inspectors was to the same effect.

Clearly the evidence offered in that case as to the seaworthiness of the vessel was much stronger both in quantity and degree than that offered in this case. Yet the Court found in the case cited:

"But admittedly the weather was not heavy until the night before the leak, and although from that time until the ship was abandoned there was heavy weather, there was nothing so extraordinary about it that a ship in proper condition to make an ocean voyage should not have been in condition to undergo the strain. . . . I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the fact that she sprang so bad a leak on the first night of heavy weather that occurred upon the voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage."

This decision of Judge Holt was affirmed on appeal, where Judge Rogers said:

"But neither the good intentions of the respondent nor the competency of this captain can save the respondent from liability if, notwithstanding what was done the vessel was not in reality in a seaworthy condition when this voyage was commenced.

"To constitute seaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo."

And again:

"While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage."

The only points upon which the case just cited and quoted can be distinguished from the case at bar is that the loss was more serious.

Essential fact for essential fact the cases are identical and the words quoted from the opinions of the courts apply even more strongly to the present case than to the case in which they were written, and the decision in that case flatly rules this one.

See also:

Atlas Portland Cement Co. v. P. Dougherty

Co., 205 Fed. 508 (C. C. A. 2nd. Circ.);

The Erskine M. Phelps, 231 Fed. 767 (D. C. N. D. Cal. 1915);

The River Meander, 209 Fed. 931 (D. C. So. D. N. Y., 1913);

- Compagnie Maritime Francaise v. Meyer*,
 248 Fed. 881 (C. C. A. 9th Cir. 1918);
The Edwin L. Morrison, 153 U. S. 199;
The Babin Chevrage, 208 Fed. 966 (1913);
The Aggi, 93 Fed. 484;
The Orcadian, 116 Fed. 930.

Under these decisions the unseaworthiness of the schooner was clearly established in this case, and for the damages resulting therefrom the libellant was clearly entitled to recover.

The loss arising out of the damage to part of the cargo delivered was allowed by the District Court and need not be further considered in connection with this petition. The loss arising from the short delivery, however, is in question, and the facts and contentions in connection therewith are as follows:

The intake weight of the cargo was prima facie established by the bill of lading, which acknowledged, without qualification, receipt of a full cargo of bones weighing 1,210,000 Kilos equivalent to 2,670,345 pounds avoirdupois.

The correctness of the intake weight as set forth in the bill of lading was further supported by additional strong evidence.

The claimants at the trial offered no evidence sufficient to rebut even the prima facie proof made by the bill of lading.

The out-turn weight of 2,521,276 pounds, while a little more involved, is clearly established and has at no point in the case been questioned.

Deducting from the intake weight of 2,670,345 pounds the out-turn weight of 2,521,276 pounds, leaves a net shortage of 149,069 pounds. The value of this quantity of bone at the time and place of delivery is undisputed and was \$27 per net ton of 2000 pounds, less freight at the rate of \$6 per gross ton of 2240

pounds, or \$1613.14, the appellee's claim having been made in the sum of \$1612.26 through a mathematical error in calculation.

Reference to the bill of lading (Record, p. 45) discloses that it acknowledges receipt of

"a full and complete cargo of bones weighing one million two hundred and ten thousand kilos, marked and numbered as per margin,"

and in the margin appears:

"1,210,000 kilos bones. In this quantity is included 12,474 kilos in 287 bags."

Nowhere in the bill of lading are these two statements of the quantity of bones in any way qualified by the insertion of "weight unknown," "shipper's weight," or any of the usual similar expressions.

It is well established that a bill of lading which acknowledges receipt of a quantity of goods without more, is strong prima facie evidence of the correctness of the quantity stated and until contradicted by the most satisfactory proof to the contrary, is conclusive on the point

The Lady Franklin, 8 Wallace 328;

Planter's Fertilizer Co. v. Elder, 101 Fed. 1001;

DeSola v. Pomares, 19 Fed. 373.

In *The Presque Isle*, 140 Fed. 202 (D. C. N. D. N. Y.), 1905, it was said:

"It is uniformly held that a bill of lading is prima facie evidence of the receipt of the merchandise and its condition at the time of delivery (4 Amer. & Ency. of Law, p. 728; Nelson v. Woodruff, 66 U. S. 156, 17 L. Ed. 97; Ellis v. Willard, 9 N. Y. 529; The T. A. Goddard [D. C.], 12 Fed. 174; Lazarus v. Barber [C. C. A.], 136 Fed. 543)."

And in *James v. Standard Oil Co.*, 189 Fed. 719 (D. C. So. D. N. Y.), the Court, holding that the vessel had conclusively established the delivery of all the cases received on board, held that the presumption arising from the statement of quantity in the bill of lading was overcome.

Holt, J., said:

"This is the number stated in the bill of lading, and the statement in the bill of lading of the number of cases received is strong *prima facie* evidence of such receipt, but it is not conclusive."

On Appeal the decision was affirmed, 191 Fed. 827 (C. C. A., 2nd Circ.), Judge Ward saying, page 828:

"The bill of lading in respect to the quantity received is a receipt and, though entitled to great weight as an admission by the ship, it is not conclusive. *The burden lies upon the ship of thoroughly satisfying the Court that she actually has delivered all the cargo she has received, and that the bill of lading is erroneous.*"

Under these authorities and the circumstances of this case, the bill of lading weight must stand as correct unless the ship, in the words of Judge Ward, "*thoroughly satisfies the Court that she actually has delivered all the cargo she has received, and that the bill of lading is erroneous.*"

We submit that the ship does not sustain this burden so long as she leaves open and unanswered a reasonable explanation of the shortage, supported by and consistent with all the facts of the case, and under which she would be liable. In other words, the ship does not sustain the burden until she has conclusively established that there was no loss, and consequently the bill of lading weight was wrong, or else conclusively demonstrates that the loss was due to a cause for which the ship was not responsible.

In this case there are four possible explanations of the shortage:

First.—Mistake in the intake or bill of lading weight.

Second.—Mistake in the out-turn or delivered weight.

Third.—Natural shrinkage.

Fourth.—That the part of the cargo not delivered was pumped out on the voyage.

If the shortage was due to either of the first, second or third causes, the vessel would be excused from liability; if to the fourth cause, it would have to respond in damages.

There has been no dispute as to the out-turn weight. The claimants have contended that the shortage was due to a mistake in the bill of lading or intake weight, to natural shrinkage or to a combination of the two. The petitioner consistently maintained that the undelivered cargo was pumped overboard, and that the bill of lading weight was correct.

The unqualified statement of the weight of the cargo in the bill of lading is very strong *prima facie* evidence of its correctness, which in this case is supported by the other evidence in the case.

Captain Forsyth, master of the schooner, testified that libellants' men weighed the bones as they were put aboard and (Record, p. 162) described the method used, which seems to be careful and exact. He said:

“They have a little trolley track lying in the yard, and they have a little flat trolley and the men will fill those baskets. This little trolley car is weighed in the morning with so many empty baskets. Then they will fill those empty baskets and put them on the trolley car, and run them down and put them on the scales, and each man will take a basket and carry it across the street and dump it down the hold.”

In its essential particulars this system of weighing is the same as that used when the vessel was discharged, and which gave such satisfactory results.

The captain was so satisfied with the weighing at Buenos Aires that he was content to sign a clean bill of lading without inserting any of the customary qualifying phrases, such as "shipper's weight," "said to weigh," "weight unknown," etc., and presumably paid the stevedore on the basis of the weight shown.

The shipper had no incentive to overstate the weights inasmuch as the cargo was sold on the delivered weight.

The stevedore, the only person interested in overstating the weight, had, as the master testified (Record, pp. 162-163), nothing to do with the weighing.

All these matters most strongly support the correctness of the bill of lading weight, and give it an evidential value much greater than its mere presence in the bill of lading.

Against these facts there is no controlling evidence worthy of consideration.

The captain testified that he delivered all the cargo he received. This is a mere statement of a conclusion, and if it were to be given controlling weight, shippers and consignees would be placed entirely at the mercy of unscrupulous masters. The other evidence does not support the captain's averment which was predicated, on the fact that when the loading was completed, the hatches were closed and battened down, and were not again opened until the vessel berthed at Philadelphia.

These facts are entirely consistent with that which we contend is the true theory—namely that the missing part of the cargo was pumped overboard with the water which leaked into the vessel.

In this connection it is to be noted that the captain qualified his statement that he had delivered all the cargo he received, when on cross-examination he

admitted (Record, p. 171), that the fine particles of bone might have been pumped overboard.

The only other evidence which it could be argued might tend to impeach the correctness of the bill of lading weight is that referred to by the District Court where it calls attention to the fact that although the bill of lading calls for 287 bags of an average weight of 98 pounds apiece, the out-turn shows the delivery of 241 bags, averaging in weight about $84\frac{1}{2}$ pounds each.

A further examination of the evidence, however, discloses that there is no basis to support the presumption sought to be raised.

In addition to the 241 bags counted, a very considerable number of bags were broken, and were heaved up on deck, together with the bones they had contained.

No one counted the broken bags, and when the master was asked by the Court whether he thought as many as forty-six bags were broken, replied, "They must have been" (Record, p. 161).

The presumption that there was a shortage in the number of bags in the out-turn is purely speculative as there is no evidence whatsoever as to the actual number of bags delivered.

So, too, with any argument based on the difference between the average intake and out-turn weights of the bags.

These bags were of all sizes, and in no way uniform in weight or otherwise. It is exceedingly doubtful whether they were tightly sewed, and it is most likely that a great quantity of the contents could have fallen out, even from the bags that were discharged with bones still in them.

The method of loading was exceedingly likely to break the bags, as was also the working of the cargo on the voyage from Buenos Aires to Philadelphia, and under the conditions attending the loading and carriage of this cargo, and the rough handling to which

it was subjected, the bags most likely to break would be the ones most heavily filled.

Any argument based on the difference between the average intake and out-turn weights of the bags is therefore entirely speculative.

It is thus apparent that to argue from the difference in count and average weight of the bags of bones, is to pile speculation upon speculation to reach a result so wholly speculative as to be impossible of belief.

The existence of the shortage is equally consistent with any explanation that may be made of it, and consequently cannot be urged as impeaching the correctness of the bill of lading weight.

The out-turn weight has not been, and we assume will not be, questioned in this case, and therefore must be taken as conclusively established.

The claimants argue that there is generally a shortage in bone cargoes. This may in fact be admitted. The only testimony as to the extent of such a usual shortage, however, is that of the witness, Burrichter, who testified that the customary shortage is from one to two per cent. as a fair average; that three per cent. or four per cent. would be very unusual. In the present case, the shortage is approximately five and six-tenths per cent., far in excess of even what would be considered very unusual.

The facts exclude the possibility of the existence in this case of the causes of such shrinkage on the ordinary voyage.

The only explanation that can be given of the ordinary shortage is that bones dry out during the voyage (Record, p. 158). It also appears that bones when soaked in water act like sponges, and become saturated, and when exposed to dampness will absorb moisture from it (Record, pp. 77 and 78).

Under these conditions, not only was there in this case no opportunity for any drying out of the cargo,

but on the contrary, under the conditions surrounding the transportation of this cargo there should be an accretion in weight.

For a period of upwards of two months there was constantly a considerable quantity of water in the hold. At times this water was five feet deep and during this period the vessel was leaking at the rate of six inches an hour. The hatches were tightly battened down and covered.

A great quantity of the bones was constantly soaking in the water in the hold, and, coming up through the tropics, it is clear that the atmosphere in the space in the hold of the vessel above the water must have been very moist.

These facts rendered it impossible for the bones in this cargo to dry out on the voyage and exclude the possibility of such an explanation of the shortage.

From the foregoing discussion, it is manifest that the three possible explanations of the shortage which would free the ship from liability are not supported by the evidence in this case, and it remains to consider the fourth possible explanation, namely, that the missing part of the cargo was pumped overboard during the voyage in the form of ammonia and phosphoric acid in solution, and in the form of fine particles of bone.

When chemically analyzed after being discharged at Philadelphia a large part of the bones were found to be deficient in certain of their soluble constituents—in the ammonia to the extent of $\frac{3}{4}$ per cent.; in phosphoric acid to the extent of $6\frac{1}{2}$ per cent., or, in all, to the extent of 23,795 pounds. It is obvious that to this extent the shortage is accounted for by the pumping overboard of this quantity of ammonia and phosphoric acid in solution.

As to the remainder of the shortage the evidence clearly sustains the theory that it was pumped over-

board in the form of fine particles of bone—bone dust. The master, it is true, first testified that the bone could not have gotten into the pumps, but when cross-examined he excluded from his statement the fine bone particles and admitted that these might have been pumped overboard (Forsyth, p. 144).

A very large part of the cargo when loaded was in the form of this fine machine-crushed bone—the process of loading and the motion and working of the cargo during the voyage, all would operate to reduce still more of it to this condition.

These finer particles would all sift to the bottom of the hold, thence through the ceiling into the pumps and through the pumps overboard.

There is nothing in the facts shown or attempted to be shown at the trial which is inconsistent with this last explanation of the shortage, as there is with the others; on the contrary, the evidence and the facts clearly point to the last explanation as the true manner in which the shortage occurred.

The foregoing explanations of the shortage are the only ones possible.

Can it be held that the ship has sustained the burden of proving the incorrectness of the bill of lading weight by "*thoroughly satisfying the Court that she actually has delivered all the cargo she has received and that the bill of lading weight is erroneous*" when she in no way has excluded the explanation of the loss which is demonstrated by the overwhelming weight of the evidence to have been the true explanation and under which the ship is liable?

We submit that the evidence most clearly establishes the vessel's liability and that the District Court erred in failing to award to libellant its full claim.

It remains to note a suggestion found in the opinion of the trial Judge, who (Record, p. 190), said:

"At the same time, the part of the cargo which had been dissolved by the action of the salt water and thus lost to the shipper would be included in any claim for damage made because of the cargo having become wet. It is, therefore, important to keep clear the distinction between the shortage in the cargo as such and a loss in bulk or weight of the cargo due to the damage from salt water, lest the two claims be permitted to overlap, and in this way there be a double allowance of the damage claim."

The trial Judge felt that if the libellant's claim were allowed in full, there would be an overlap and double damages awarded. This thought was based on the fact that in showing the nature of the damage to the cargo, libellant showed that the damaged bones were deficient in some of their soluble constituents, and from this the Court reasoned that the allowance of the libellants' claim for damage would also reimburse libellant for the shortage up to the amount of the dissolved and lost constituents of the damaged bone.

This is most clearly and demonstrably wrong. The damage claim is purely and simply the difference between the contract price and the actual market value in its damaged condition of the net delivered weight of the injured portion of the cargo, and is not in any way based on the quantity or weight of the missing constituents of this damaged bone.

The error of the trial Court's theory is most clearly demonstrated mathematically by the accompanying table (opposite this page) which shows most clearly that the full allowance of both claims made on behalf of the libellant would involve no overlap or double damage whatsoever, but, on the contrary, would only make the libellant whole for the damage it suffered owing to the unseaworthiness of the schooner.

ANSWER TO THE THEORY OF DISTRICT COURT AS TO OVERLAP AND DOUBLE DAMAGES.

1. If all the bones called for by the Bill of Lading had been delivered, Libellant would have received:		
2,670,345 lbs. @ \$27.00 per 2000 lbs.	\$36 049 66	
Less Freight on same @ \$6.00 per 2240 lbs.	7 152 70	
Net receipts	\$28 896 96	
2. Libellant on the cargo actually delivered did receive:		
2,194,174 lbs. @ \$27.00 per 2000 lbs.	\$29 621 35	
327,102 lbs. @ \$21.30 per 2000 lbs.	3 483 64	
Less Freight on 2,521,276 lbs. @ \$6.00 per 2240 lbs.	33 104 99	
Net receipts	6 753 42	
3. Actual Loss to Libellant	26 351 57	\$2 545 39
4. If full recovery allowed, Libellant will receive:		
Damages for injury to 327,102 lbs. @ \$5.70 per 2000 lbs.	932 24	
Damages for short delivery 149,069 lbs. @ \$27.00 per 2000 lbs. ..	2 012 43	
Less Freight on 149,069 lbs. @ \$6.00 per 2240 lbs.	399 29	1 613 14 ^a
Net recovery		2 545 38
5. Excess of Loss over Recovery		61

^aThrough a mathematical error in original calculation of the Libellant's claim the value of the bones not delivered is stated as \$1612.26—the correct figure is that given above—\$1613.14.

The District Court thus denied recovery to your petitioner for short delivery upon what was clearly an entirely erroneous conception of the law and of the legal sufficiency of evidence, and in no way involved any question of credibility of witnesses.

The claimants in the District Court appealed and when the appeal was finally called for argument, after the expiration of the time limited for the present petitioner to appeal had expired, the claimants moved to withdraw their appeal.

This motion the Circuit Court of Appeals, without passing upon the merits of the case, has granted, to the injury of your petitioner who is thereby deprived of the valuable and substantial right of having its claim, denied in the District Court, passed upon de novo in the Circuit Court of Appeals, a right upon which, under the decisions of this court, it was entitled to rely.

THE ACTION OF THE CIRCUIT COURT OF APPEALS IS INCONSISTENT WITH THE RULINGS OF THIS COURT IN *IRVINE V. "THE HESPER"* AND *REID V. THE AMERICAN EXPRESS CO.* AND NULLIFIES THE RULE THAT ON AN APPEAL IN ADMIRALTY THE CASE IS TRIED DE NOVO IN THE CIRCUIT COURT OF APPEALS.

Under the decisions of this Court in *Irvine v. "The Hesper,"* 122 U. S. 256, and the many cases following that decision, particularly the recent emphatic approval of its doctrine by his Honor, the present Chief Justice, in *Reid v. American Express Company*, 241 U. S. 544, an appeal in Admiralty vacates the decree of the District Court, and brings the whole case before the Circuit Court of Appeals for a trial de novo.

As stated by Mr. Justice Blatchford in *Irvine v. "The Hesper"* (*supra*), at page 266:

"It is well settled, however, that an appeal in

admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. *Yeaton v. United States*, 5 Cranch 281; *Anonymous*, 1 Gallison 22; 'The Roarer,' 1 Blatchford 1; 'The Saratoga' v. 438 Bales of Cotton, 1 Woods 75; 'The Lucille,' 19 Wall. 73; 'The Charles Morgan,' 115 U. S. 69, 75. *We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.*" (Italics ours.)

This holding was reaffirmed in *Reid v. The American Express Co.* (supra), where his Honor, the present Chief Justice, said:

"It is not denied that in the Second Circuit the right to a de novo trial was considered as settled by *Munson S. S. Line v. Miramar S. S. Co., Limited*, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a de novo trial in the court below authoritatively resulted from the ruling in *Irvine v. 'The Hesper'*, 122 U. S. 256, a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the *Miramar Case*. Entertaining this view, we do not stop to consider the various arguments which are here pressed upon our attention

tending at least indirectly to establish the non-existence of the right to trial de novo in the court below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever."

What do these cases mean? Obviously and necessarily they mean what they say, that in an admiralty appeal the Circuit Court of Appeals is not sitting as a court of review, but as a trial court, hearing and determining the case upon the pleadings and proofs submitted in the District Court and any additional proofs that may be properly introduced in the Circuit Court of Appeals.

Is it conceivable that any trial court has the legal discretion, at the defendant's request and over the protest and objection of the plaintiff, to refuse to hear and determine the claim made by the plaintiff against the defendant where the parties and subject matter are properly before the court and within its jurisdiction?

Manifestly it cannot do so; and yet, such is the necessary result of the ruling of the Circuit Court of Appeals in this case, inasmuch as under the decisions in *Irvine v. "The Hesper"* and *Reid v. The American Express Co.*, the Circuit Court of Appeals must be regarded in this case as a trial court.

This point here raised is a novel one, as was recognized in the opinion of Judge Buffington in this case when he says (Record, p.):

"We find no reported case involving the precise question here raised."

The decision of the Circuit Court of Appeals in this case has a most far-reaching effect. Its scope is

wide and its application broad. If it is to stand, an appellee in admiralty, a part of whose claim was denied in the District Court, can no longer rely upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, to secure him his right to be heard thereon in the Circuit Court of Appeals. To protect himself he will be under the necessity of assuming the burden and expense of taking a cross appeal, thereby encumbering the record and adding most materially to the expense, annoyance and inconvenience of litigation, increasing its complexities, and in most cases undoubtedly, causing additional delay—already one of the greatest objections and most serious defects in the administration of justice.

It is suggested in the opinion of Judge Buffington in this case that to refuse the motion and hold the appellant not entitled to withdraw his appeal will work a great hardship to the appellant by limiting his control of his litigation. But this suggestion is a mistaken one.

In the words of Mr. Justice Blatchford in *Irvine v. "The Hesper,"*

"When the libellants appealed they did so in view of the rule, and took the risk of the result of a trial of the case de novo."

The appellant, therefore, is confronted by no hardship—he acts with his eyes open.

The result of refusing to permit the appellant in such case to withdraw his appeal over the appellee's objection would, on the other hand, be most wholesome.

It would go far to curb and put an end to the taking of hasty and ill-advised appeals, would secure to the appellee his right to be heard de novo without the necessity of complicating the admiralty procedure by

taking a cross appeal, and would prevent the most patent injustice to an appellee who, in proper reliance upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, has felt secure in his right to be heard, would otherwise find that this right has been swept away from him at a time when his own right to appeal had expired and he was no longer able to avail himself thereof.

While there seem to be no Federal Court decisions on the precise point here raised, there have been one or two State Court decisions thereon and these plainly and clearly support the rule for which we here contend.

In *Peterson v. Frey*, 109 Mich. 689, a case where an appeal was taken under a statute which provided that the appellate court should "become possessed of the case, the same as if it had been originally commenced in said Appellate Court," it was held that an appellant could not dismiss his appeal without the consent of the appellee.

In *Brigham v. Waterhouse*, 32 Texas 468, a case where under the statute an appeal effected a trial de novo in the appellate court, it was held that the appellant could not withdraw his appeal without the consent of the appellee.

The rule announced in these cases is, we submit, correct and consistent with good practice and the decisions of this Court.

What discretion an appellate court has to permit the withdrawal of an appeal is necessarily limited by legal precedents and rules, and certainly should not and cannot be exercised to deprive an appellee of a valuable and substantial right.

In the present case, and in all cases where by an appeal the cause is brought before the appellate court

for a trial *de novo*, an appellee, a part of whose claim has been denied in the District Court, has a right to have the appellate court hear and determine his claim *de novo*, as a court of first instance.

This right is a valuable and substantial one, of which the appellee should not be deprived without his consent, and we submit that it is no more within the legal discretion of the appellate court in such a case to deprive the appellee of this right, than it is within the discretion of any other trial court at the defendant's request and over the plaintiff's objection to refuse to hear and determine on its merits a cause in which the parties and the subject-matter are properly within its jurisdiction and before it for determination.

The novelty and importance of the point here raised, its wide scope and application, the serious hardship and injustice arising in this case and likely to arise in future cases out of the erroneous decision of the Circuit Court of Appeals herein, the necessity for the proper determination of the practice of the courts and the general interests of jurisprudence, make this case most surely one for the exercise by this Court of its supervisory and corrective powers.

CONCLUSION.

We, therefore, submit that on the foregoing reasons this Honorable Court should exercise the power vested in it to issue the writ of certiorari prayed for and have this cause brought before it for review and final determination *or* in the alternative that this Honorable Court should exercise the power vested in it to issue a writ of mandamus directed to the Circuit Court of Appeals of the Third Circuit and directing said Circuit Court of Appeals to dismiss the motion filed by

the appellants therein for leave to withdraw their said appeal and requiring said Circuit Court of Appeals to hear and determine the said cause upon its merits.

Respectfully submitted,

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner.

WILLIAM J. CONLEN,
Advocate.

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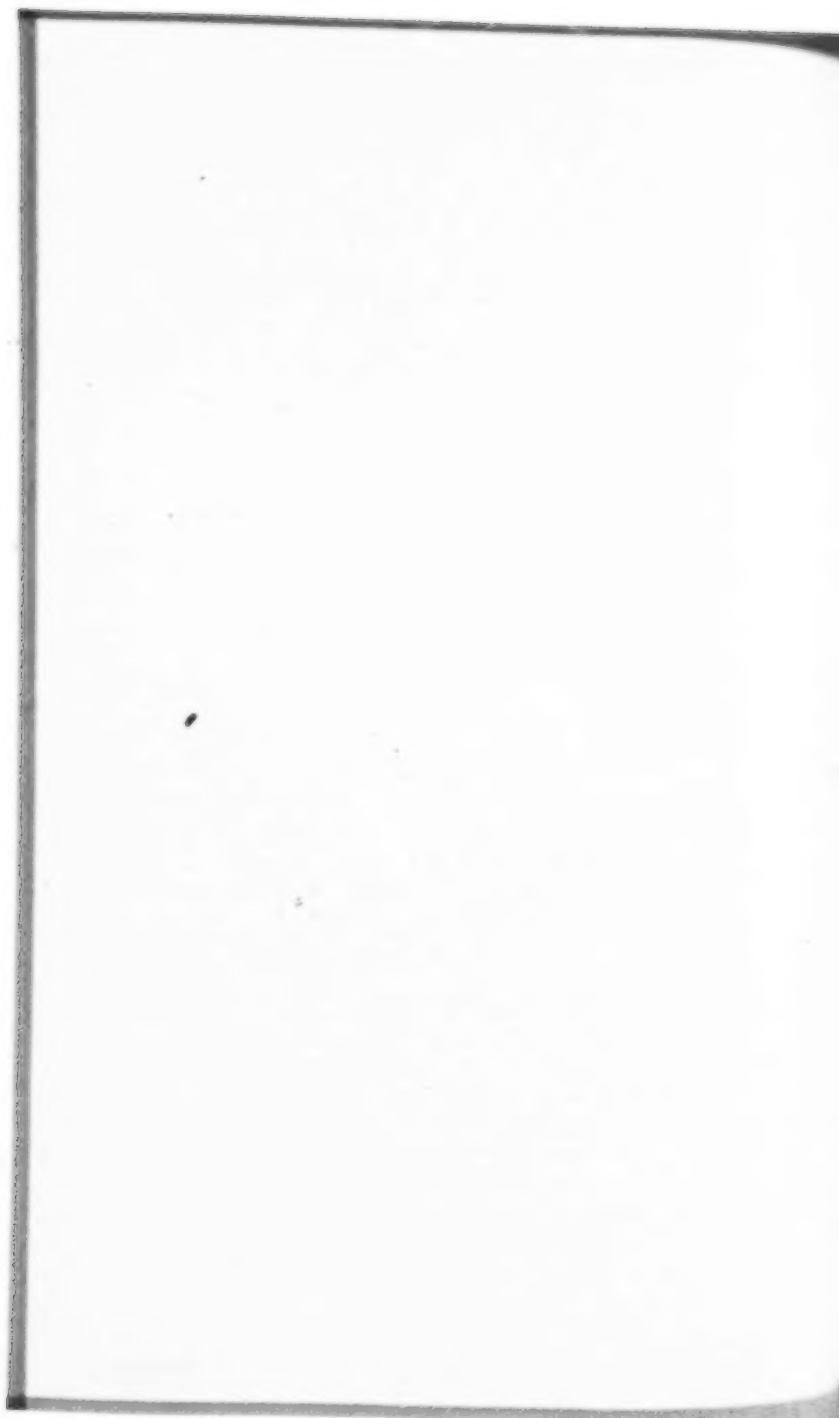
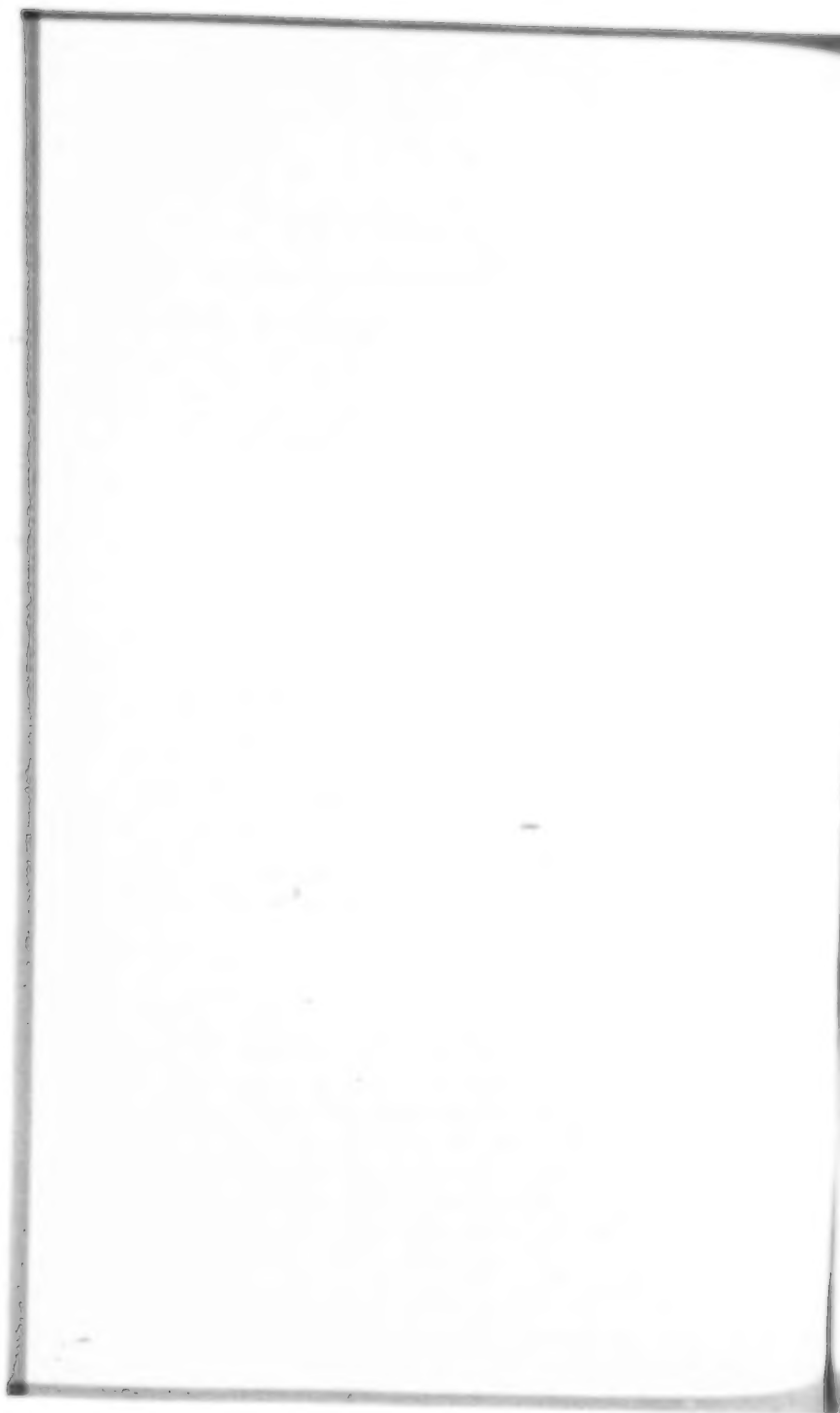


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IN THE
Supreme Court of the United States.

October Term, 1918. No. 943.

T. M. DUCHE & SONS (BUENOS AIRES), LTD.,
Petitioner,

v.

AMERICAN SCHOONER "JOHN TWOHY," HER
TACKLE, ETC., ALBERT D. CUMMINS AND
HOWARD COMPTON,
Claimants.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

I. ABSTRACT AND STATEMENT OF THE CASE.

The schooner "John Twohy," warranted to be "tight, staunch, strong and in every way fitted for the intended voyage," was chartered by the claimants to the libellant to carry a full and complete cargo of bones from Buenos Aires to Philadelphia.

The "Twohy" was a reclaimed wreck. When she sailed from Philadelphia for South America to enter on the performance of this charter she had just undergone repairs after having lain in a badly wrecked condition for fifteen months. In the course of her outward voyage, it appeared that she was leaking, the extent of the leak and other conditions attending her

outward voyage being unobtainable because of the destruction of her log by claimants after this suit was brought, but before hearing.

On October 21, 1915, having loaded a full cargo, the "Twohy" sailed from Buenos Aires bound for Philadelphia, where she arrived December 28, 1915, and discharged her cargo, a large part of which was found to be wet and damaged. In addition to delivering a part of the cargo in a damaged condition, the ship wholly failed to deliver 149,069 pounds of the bones called for by the bill of lading, which admitted without any qualification whatsoever, the receipt of 1,210,000 kilos, equivalent to 2,670,345 pounds.

The libel in this case set forth two claims: One for short delivery and the other for injury to part of the delivered cargo, both arising out of the unseaworthy condition of the ship.

It appeared that when the vessel was only about nine days out from Buenos Aires she encountered weather which was slightly rough, but not more severe than was to be expected at that time and place. During this rough weather she began to leak badly and continued to do so for the rest of the voyage, the leakage being at the rate of about six inches of water an hour, necessitating pumping every two hours, there being at one time as much as five feet of water in the hold.

The libellant contended that the loss and damage was due to the unseaworthiness of the vessel, the claimants, defending, that it was due to perils of the sea within the exceptions of the charter party and bill of lading.

The Court below found the vessel unseaworthy and awarded libellant damages for the injury to the part of the cargo delivered, but on the ground that libellant's proof did not sufficiently demonstrate the amount

of the short delivery, refused to award libellant any damages on account of that claim.

A final decree was entered on April 16, 1918, and on April 27, 1918, an appeal was taken by the claimants to the Circuit Court of Appeals of the Third Circuit.

This appeal came on for argument in October and November, 1918, and on each occasion was continued at the request of the appellants. It again came on in December, 1918, when the appellants moved for leave to withdraw their appeal.

This motion was opposed by the petitioner here, but on February 10, 1919, the Circuit Court of Appeals over the protest and without the consent of the petitioner, in an opinion by Judge Buffington (Record, p. 204), granted the motion, provided the claimants paid the amount of the decree of the District Court with interest and costs within thirty days, which payment the claimants offered to make.

On March 14, 1919, a final decree (Record, p. 206a) was entered in the Circuit Court of Appeals ordering the dismissal of the appeal.

On March 28, 1919, the petitioner filed with the Supreme Court of the United States its petition for a writ of certiorari. This petition was granted and on April 17, 1919, the certiorari issued, and with the return thereto, was received and filed in the office of the Clerk of the Supreme Court on May 7, 1919.

The questions of law presented under these facts and raised on this certiorari are the following:

I. Where a libellant in admiralty recovers a part of his claim in the District Court, and is denied the balance thereof, and the respondent appeals to the Circuit Court of Appeals, can the respondent-appellant thereafter, and after the expiration of the time limited

for an appeal by the libellant, withdraw his appeal over the protest and without the consent of the libellant-appellee?

II. Under such facts is it within the legal discretion of the Circuit Court of Appeals to permit the appellant to withdraw its appeal over the appellee's objection and without its consent?

III. When a libel is filed to recover for short delivery and for cargo damage, and the Court finds the vessel unseaworthy and allows recovery for the cargo damage, can it refuse to allow for the short delivery on the ground that it is not sufficiently proved and assume that there is an error in the bill of lading weight, in a case where the burden is on the ship to exonerate itself and the Master testifies that he delivered all the cargo he received but leaves entirely unexplained and does not exclude an explanation of the shortage under which the ship would be liable, and which is supported by the overwhelming weight of the evidence?

II. SPECIFICATION OF THE ERRORS RELIED UPON.

The petitioner relies upon and assigns the following errors:

1. The Circuit Court of Appeals erred in granting the motion of the appellants below for leave to withdraw their appeal.
2. The Circuit Court of Appeals erred in refusing to dismiss the motion for leave to withdraw its appeal.
3. The Circuit Court of Appeals erred in refusing to hear and determine on the merits the appeal taken

from the District Court for the Eastern District of Pennsylvania in this cause.

4. The Circuit Court of Appeals erred in not considering on the merits the claim of the appellee in that court, the petitioner here, for additional damages for short delivery.

5. The Circuit Court of Appeals erred in refusing to grant the petitioner damages for short delivery which had been refused in the District Court.

III. ARGUMENT.

The questions raised in this case may for convenience be divided into two groups or classes, those relating to the question of practice and those relating to the merits. Primarily the case is before this Court on the question of practice but as this question can be best understood and decided with reference to the particular facts, we desire for the sake of clearness and orderly consideration, to present first, as briefly as possible, the points raised on the merits.

The questions involved in the Circuit Court of Appeals were novel ones, of great importance in the admiralty practice, not heretofore decided by this Court or any other Federal Court; the decision of the Circuit Court of Appeals in this case is erroneous, tends to complicate the admiralty practice, is contrary to and to a large extent nullifies important decisions of this Court of such long standing as to have become settled law, and if allowed to stand unreviewed and uncorrected by this Court will, in many cases, as it has in this, work the greatest injustice to suitors who act in reliance upon the decisions of this Court for the protection of their rights and the conduct of their litigation.

Two issues were raised in the District Court—*First*, the seaworthiness of the "*John Twohy*," and, *Second*, the amount of the loss. The second issue had two branches: (a) Loss arising from damage to part of the cargo delivered; (b) loss arising from short delivery.

The District Court found the vessel unseaworthy and awarded damages for injury to the cargo delivered, but denied recovery for the short delivery.

1. THE "*JOHN TWOHY*" WAS UNSEAWORTHY.

The evidence clearly established the unseaworthiness of the "*John Twohy*" as the cause of the loss.

In considering this branch of the case four points should be borne in mind:

First.—The provision in the charter party that the vessel is "*tight, staunch, strong and in every way fitted for the intended voyage*" is an absolute warranty of seaworthiness even against latent defects.

The Edwin L. Morrison, 153 U. S. 199;

The Lockport, 197 Fed. 213;

The Caledonian, 42 Fed. 681.

Second.—The Harter Act, which is not mentioned in the charter, does not operate to relieve the owner or the vessel from liability for the consequences of unseaworthiness, even where it is proved that the owner exercised due diligence to make the vessel seaworthy. It is incumbent on the owner to provide a seaworthy vessel, unless *by contract* he limits his obligation to the exercise of due diligence to make her so.

The Carib Prince, 170 U. S. 655;

The Sandfield, 92 Fed. 663;

Farr & Bailey Co. v. International Navigation Co., 98 Fed. 636;

The Ninfa, 156 Fed. Rep. 512;

The Indrapura, 190 Fed. Rep. 711.

Third.—There is no provision in the charter party limiting the obligation of the owners to provide a seaworthy vessel or reducing their obligation in that connection to the exercise of due diligence to make the vessel seaworthy.

Fourth.—The burden of affirmatively proving the seaworthiness of the vessel at the time of loading the cargo, and at the commencement of the voyage, rests upon the ship owner.

International Navigation Co. v. Farr & Bailey Co., 181 U. S. 218;

The Wildcroft, 201 U. S. 378;

Bradley v. Lehigh Valley Co., 153 Fed. 350.

With these points in mind let us consider the facts in the case, which are essentially undisputed. These clearly appear of record, and are as follows:

The "John Twohy" is an old schooner, which, when built in 1891, was not properly fastened and became badly hogged (Cummins, p. 145). In November, 1913, she was wrecked off the North Carolina coast, and from that time until February, 1915, was lying in a wrecked condition at Southport, North Carolina, and at Philadelphia (Record, p. 27).

During the period from February to June, 1915, the "Twohy" was repaired and strengthened, and on June 18, 1915, sailed from Philadelphia with a cargo of lumber, bound for Rosario on the River Plate, where she arrived the early part of September (Record, p. 30). On her outward voyage she was found to be leaking, and at the conclusion thereof, the captain removed a turnbuckle rod which had been placed athwartships near her bow and plugged the holes,

after which she proceeded to Buenos Aires to load the cargo of bones here involved (Record, p. 28).

Of the details of the outward voyage we have no information owing to the loss or destruction of the log of the vessel during the pendency of this action (Record, pp. 103, 148, 149). The only information which we have is that on that voyage the "Twohy" leaked to such an extent that the master felt it necessary or advisable at the end of the voyage to remove a turnbuckle rod which had been put in to strengthen her, and plug the holes (Record, p. 28).

The testimony is that the master did this on his own responsibility without having a survey of the vessel made at Buenos Aires (Record, p. 154).

The claimant produced a number of witnesses, all of whom swore that the turnbuckle rod was entirely unnecessary, added nothing to the strength of the vessel, and had no effect on her strength whatsoever; the claimant himself passes off the presence of the turnbuckle rod as a "whim of mine" (Record, p. 143).

But after the discharge at Philadelphia of the cargo here in question—the turnbuckle rod that had been taken out was, by order of the claimant, put back in the vessel again, at exactly the same place from which it had been taken (Record, p. 148).

This fact alone is sufficient to impeach, if not utterly to discredit, the testimony that the turnbuckle rod was useless and unnecessary.

The true function which this rod did perform, and was in the vessel to perform, was to hold her together and strengthen her and the effect of taking it out was to let her settle back and loosen her seams (Mowatt, pp. 98, 99), *all of which were recalced and recemented after she discharged her cargo at Philadelphia* (Record, p. 134).

It is submitted that the above facts alone are sufficient to show that the vessel was unseaworthy. Supplemented, however, as this testimony is by the other evidence, and the facts as they developed on the voyage, the unseaworthiness of this vessel at the inception of the voyage here involved is clearly and undeniably established.

The vessel left Buenos Aires on October 21, 1915, bound for Philadelphia. Here again we are confronted with the loss or destruction of the log book pending this action. The extended protest made by the master upon arrival at Philadelphia gives us no details of the weather, the progress of the vessel, or the amount of leakage for the days from October 21st to October 29th.

The first detail appearing from the protest and from the other evidence before the Court is that of October 30th, when the weather became a little heavy and continued so for a day and a half.

This, however, was ordinary bad weather, nothing extraordinary or unexpected. As stated by the master (Forsyth, p. 157):

"Q. How would you describe this voyage which you made from Buenos Aires up to Philadelphia with the cargo of bones?

A. About the usual thing. I suppose you would have about eighty per cent. fine weather and the rest bad, twenty per cent. bad."

Forsyth, pages 164-5:

"Q. You say you had a northeast gale and that you very often do not get those kind of gales?

A. When is this?

Q. On the way back.

A. Oh, yes.

Q. But, you do get, I have you down, as getting a northwest gale?

A. Yes.

Q. And you expect that southwest?

A. The northwester—when it gets into the northwest the first thing you know it jumps from the northwest to the southwest.

Q. And it is customary to have southwest gales in that season of the year at that point, is it not?

A. Yes, you will get southwest gales down there. You can look for them all times of the year, but of course there is more southwest wind down around the river from June, July, August and September.

Q. And this season of the year, that gale was unusual?

A. Which one?

Q. The one that you had, the northeast gale?

A. No—in October.

Q. It was not unusual?

A. This southwest gale in October?

Q. Yes.

A. That is very strong down there. No, it was not an unusual thing to get the southwest gale. You expect those things, you look for them.

Q. You talked about northwest gales you don't look for?

A. No.

Q. But they are about the same as the southwest gales, are they?

A. About the same as what our southwesterers are around here. You can reverse them, and you have it down pretty near."

Forsyth, page 167:

"Q. And the hatches were battened down all the way during the voyage and the only water that came in over the top of the vessel and got in was in the cabin?

A. Yes.

Q. And the cabin door was open at the time this wave happened to strike the vessel?

A. Exactly.

Q. During this voyage were any of the deck fittings torn away from the vessel? No damage was done to the deck fittings of the vessel, was there?

A. I don't remember. I don't think so.

Q. No lifeboats carried away or anything of that sort?

A. No."

Forsyth, page 168:

"Q. You have told us that the vessel was leaking six inches per hour?

A. Yes, six inches per hour.

Q. Is that ordinary or extraordinary?

A. I think it is too much.

Q. How long did that continue?

A. From the time we got that northwest gale of wind until—of course, she always made lots of water after that, but she wouldn't make as much in moderate weather, she wouldn't make as much as when she would get into a blow, tumbling and slapping around.

Q. Did you ever have any sounding made as to the amount of water in the hold?

A. Yes, after she sprung that leak, we sounded her pretty much all the time, always somebody with the sounding rod in their hand.

Q. What was the greatest amount of water you had?

A. It seems to me at one time we had five feet."

A reference to the protest shows that the voyage consumed altogether sixty-nine days, out of which there were six days of bad weather—less than ten per cent. bad—whereas the master states (Forsyth, p. 157), that on the average voyage between Buenos Aires and Philadelphia at that season of the year the average weather would be about twenty per cent. bad—and as set forth in the testimony above quoted (Forsyth, pp. 164-165, 167, 168), the bad weather experi-

enced was nothing unusual—"just about the usual thing," "what you would expect"—"just what you look for."

The whole truth is that this vessel had an exceptionally good voyage, and had unusually good weather.

It is most important to notice that in the very first bad weather that this vessel encountered after leaving Buenos Aires she began to leak very badly. The bad weather encountered after the first day therefore cannot be taken into consideration.

The fact that the vessel could not stand even a few hours of an ordinary storm, not an unusual one, such as could be classed as a sea peril, but an ordinary usual storm such as was to be expected, anticipated and looked for—furnishes the most satisfactory evidence that she was not seaworthy at the inception of her voyage.

The burden clearly rests upon the claimant to prove that the "John Twohy" was, at the inception of the voyage, in all respects seaworthy. This is so well established that we presume it will be conceded, and in fact to do more than cite the cases above mentioned (p. 4) seems entirely unnecessary. The rule is, perhaps, as well stated as anywhere, in the case of *Benner Line v. Pendleton*, 210 Fed. 67 (D. C. S. D. N. Y.), where, at page 72, Judge Holt says:

"I have no doubt that the owners believed her to be seaworthy, and that Captain Fletcher, a very competent man, to whom the owners had intrusted the duty of putting the ship in order, believed her to be seaworthy.

"But the obligation upon the owners of a ship according to the maritime law, is that the ship must be in fact seaworthy at the commencement of the voyage, and it is entirely immaterial whether the owners believe her to be seaworthy, or have used every reasonable effort to make her sea-

worthy. If she was not in fact seaworthy when the voyage began, the owners are liable under the general rules of the maritime law unless such liability is limited by the statutes limiting the liability of shipowners."

The only testimony offered by the claimant as to the seaworthiness of the "John Twohy" is the cost and extent of repairs made upon her after she had been lying a wreck for sixteen months, the certificate of the American Bureau of Shipping, the free and easy statements of the men who repaired her (and who are not shown to have had any seafaring experience), all of which testimony relates to a time prior to the voyage preceding the one here in question. The details of the prior voyage, and what effect it may have had upon the vessel we are unable to learn, because of the destruction of the ship's log while this action was pending.

Opposed to the claimant's evidence, are the facts above outlined coupled with the fact that this vessel, although encountering nothing more than the usual and to be expected weather, sprung such a bad leak, and was in such condition, that, after the discharge of her cargo, her seams had to be recaulked and re cemented, and repairs costing upwards of \$2000 had to be made to her hull.

It is submitted that the claimant did not sustain the burden resting upon him to prove affirmatively the seaworthiness of the vessel.

On this point the present case is squarely ruled by the case of *Benner Line v. Pendleton*, 210 Fed. 67 (D. C., So. D. N. Y., 1913), affirmed in this particular, in the Circuit Court of Appeals of the Second Circuit, 217 Federal 497, which was in turn affirmed, on certiorari, by the Supreme Court, 246 U. S. 353 (1918), where the question of seaworthiness was disposed of

by Mr. Justice Holmes, who, in delivering the opinion of the Court, said:

"The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage, and that by reason thereof she sank, and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side."

In that case an action was brought against the owners of the schooner "Edith Olcott," which three or four days after leaving port sank with all her cargo.

The owners of the vessel in an effort to prove seaworthiness showed that the vessel was carefully inspected, overhauled and put in order by a thoroughly competent man before the voyage. One of the experts who examined her before she started on her voyage reported that she was "in the pink of condition." Witnesses, who examined her, testified that they found her seams and butts in first-class order, as were her rigging, decks, waterways and chain plates, and that she was "in first-class condition," "one of the finest vessels" the witness had ever seen, and "fit to go around Cape Horn in."

The superintendent of the Dry Dock Company testified that she was tight, staunch and strong. The inspector of the American Bureau of Shipping testified that the vessel was "first class," that she had been thoroughly examined for reclassification in 1905, and was given an A1 rating for six years—a rating which would have expired one year after she was lost. He stated that the "Edith Olcott" was "exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost," and that she had the highest rating ever given to a vessel of her age—having been built in 1890. The evidence given by other inspectors was to the same effect.

Clearly the evidence offered in that case as to the seaworthiness of the vessel was much stronger both in quantity and degree than that offered in this case now at bar. Yet the Court found in the case cited:

"But admittedly the weather was not heavy until the night before the leak, and although from that time until the ship was abandoned there was heavy weather there was nothing so extraordinary about it that a ship in proper condition to make an ocean voyage should not have been in condition to undergo the strain. . . . I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the fact that she sprang so bad a leak on the first night of heavy weather that occurred upon the voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage."

This decision of Judge Holt was affirmed on appeal in *Benner Line v. Pendleton*, 217 Fed. 497, where in writing the opinion of the Circuit Court of Appeals, Judge Rogers, after discussing the evidence very carefully, said (p. 501):

"But neither the good intentions of the respondent nor the competency of this captain can save the respondent from liability if, notwithstanding what was done the vessel was not in reality in a seaworthy condition when this voyage was commenced."

"To constitute seaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo."

And again at page 503:

"While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to

stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the Court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage."

The only points upon which the case just cited and quoted can be distinguished from the case at bar is that the loss was more serious.

Essential fact for essential fact the cases are identical and the words quoted from the opinions of the courts apply even more strongly to the present case than to the case in which they were written, and the decision in that case flatly rules this one.

Other cases without number might be cited to the same effect, but it is perhaps unnecessary to do more than state as briefly as possible the holdings of a few of them.

In *Atlas Portland Cement Co. v. P. Dougherty Co.*, 205 Fed. 508 (C. C. A., 2nd Circuit), a libel was filed to recover for damage by sea water to a cargo of cement.

In support of a defense based on perils of the sea, respondents showed that the vessel encountered very heavy weather, twice broke her tiller and that her gasoline engine broke down, rendering her pumps useless.

The Circuit Court of Appeals affirmed the decree in favor of the libellant on the opinion of Judge Veeder, who said:

"In the first place, the evidence fails to show that the 'Patuxent' encountered any peril of the sea. None of the witnesses called by the respondent placed the velocity of the wind any higher on the Beaufort Scale than a fresh gale; they put it between forty and fifty miles an hour. . . . In

others words, there is nothing to indicate that the weather encountered was anything beyond what was to be expected along the coast in the autumn."

In *The Erskine M. Phelps*, 231 Fed. 767 (D. C. N. D. Cal. [1915]), Judge Dooling, holding a vessel not excused by perils of the sea, said:

"But the storms encountered were not greater than might reasonably have been expected in rounding the Horn at that season of the year and in accepting this shipment, it must be presumed that it was accepted in view of the character of the goods, the character of the crating and the weather likely to be encountered."

See, too, the language of Judge Holt in *The River Meander*, 209 Fed. 931 (U. S. D. C., So. D., N. Y.), 1913:

"In the first place there can be no presumption (of seaworthiness) in such a case as this. The *Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. It must be affirmatively proved by the ship owner. Now there is no evidence in this case that the vessel was seaworthy when she began her voyage.

"In my opinion, if a ship is shown to be unseaworthy during a voyage, the inference may be drawn, in the absence of any explanation to the contrary, that she was unseaworthy when she started. Cargo owners usually cannot prove unseaworthiness at the time a voyage begins.

"It is the duty of the ship owner to know that his ship is seaworthy before the voyage begins, and if he does know it he can prove it. If a vessel proves to be unseaworthy during a voyage the burden should be on the ship owner to prove affirmatively that she was seaworthy at the time the voyage began."

The claimant here does not know and did not know whether or not the vessel was seaworthy on this voyage.

His attitude is perhaps best illustrated by his testimony (Cummins, pp. 150-151):

“Q. Never heard that the vessel leaked on that voyage going down?

A. Yes.

Q. You heard that?

A. Yes.

Q. How much did the vessel leak on the voyage going down?

A. The captain will answer that. I don't know. I wasn't aboard.

Q. What did the captain report to you?

A. The vessel leaked.

Q. How much of a leak?

A. Didn't report how much.

Q. Did you look at the log book when the captain brought it back to see?

A. No.

Q. The log book showed, didn't it?

A. I don't know, I didn't look at it.

Q. The fact is the vessel leaked?

A. I don't know.

Q. You don't know anything about that?

A. I know it leaked. I don't know how much.

Q. You never even looked in the log book to see how much it leaked?

A. No. She got there and back, that is all I was interested in.

Q. That is all you care, so it went down to South America and got back again?

A. Yes.”

Can anyone contend that the above testimony is that of a careful, prudent ship owner? Clearly it cannot be said that it is. Nor is the language of an owner who is performing his duty, which, in the language of Judge Holt, is, “to know that his ship is seaworthy before the voyage begins.”

See, too, the very recent case of *Compagnie Maritime Francaise v. Meyer*, 248 Federal 881 (C. C. A.,

9th Circuit, 1918), where a French bark, within four days after leaving Brest on a voyage from Rotterdam to San Francisco, without having encountered weather which was unusual at the season, was found to be leaking so that she had to be pumped each day thereafter until she reached the vicinity of Cape Horn, when, meeting stormy weather, the leak increased, and she was obliged to seek a harbor of refuge. It was held that she was unseaworthy at the beginning of the voyage, although surveyed at that time, and the libellants were awarded damages for the breach of the warranty of seaworthiness.

In delivering the opinion of the Circuit Court of Appeals, Judge Gilbert said (p. 883):

"The evidence was that such weather was not unusual or unexpected in that vicinity at that season of the year. It has been held by this court and by other courts that the development of a serious leak, occurring from no mishap or accident within a short period of time from leaving port, is evidence from which it may be presumed that the vessel was not seaworthy at the time of leaving. In *The Warren Adams*, 74 Fed. 413, 20 C. C. A. 486, Judge Wallace, for the Circuit Court of Appeals for the Second Circuit, said:

"Where a vessel, soon after leaving port, becomes leaky, without stress of weather or other adequate cause of injury, the presumption is that she was unsound before setting sail."

"Other decisions to the same effect are *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, 36 C. C. A. 135; *The Aggi* (D. C.), 93 Fed. 484; *The Arctic Bird* (D. C.), 100 Fed. 167; *Oregon Bound Lumber Co. v. Portland & Asiatic S. S. Co.* (D. C.), 162 Fed. 912; *Steamship Wellesley Co. v. C. A. Hooper & Co.*, 185 Fed. 735, 108 C. C. A. 71; *Carolina Portland Cement Co. v. Anderson*, 186 Fed."

In *The Edwin L. Morrison*, 153 U. S. 199, at page 210, Chief Justice Fuller, delivering the opinion of the Court, said:

"By the charter party it was agreed on the part of the vessel that she should be tight, staunch, strong and in every way fitted for the voyage, and the rule is well settled that the charterer is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo. *The Northern Belle*, 9 Wall. 526; *Work v. Leathers*, 97 U. S. 379. If there be a defect, although latent and unknown to the charterer, he is not excused. 3 Kent, *205, *Valin*, Com. Ord. de la Mar. liv 111, tit. 111. *Du Fret*; Art. XII, Vol. 1, 654; *Lyon v. Mells*, 5 East. 428; *Work v. Leathers*, *supra*.

"As said on circuit by Mr. Justice Gray, in *The Caledonia*, 43 Fed. Rep. 681, 685: 'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. *The warranty is absolute that the ship is, or shall be, in fact, seaworthy at that time and does not depend on his knowledge or ignorance, his care or negligence.*' "

And in the *Babin Chevaye*, 208 Fed. 966 (1913), Judge Wolverton, quoting with approval from *Ceballos v. The Warren Adams*, said at page 975:

"Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness because no visible or rational cause, other than a latent or inherent defect in the vessel, can be assigned for the result."

In the present case there is not even a suggestion that the weather encountered was any more severe than was ordinarily to be anticipated at that time and place. The only testimony on this point is that of the master—the claimant's own witness—and that establishes clearly and indisputably that the weather encountered by the "John Twohy" on this voyage was not only not worse than was ordinarily to be expected at that time and place, but was actually much better weather than could have been anticipated.

In *The Aggi*, 93 Fed. 484, it was held that storms, although they may have been adequate cause for the damage, will not relieve the carrier where they are not of such unusual character but that they should have been anticipated.

And in *The Orcadian*, 116 Fed. 930, it was held that where the weather is not more severe than is to be expected from the season and the locality, perils of the sea is no defense.

The only evidence which claimant presents as to seaworthiness is confined to the time the vessel left Philadelphia—what may have happened to the vessel on her outward voyage, what weather she may have encountered, what obstructions she may have hit in the river, what strains she may have been subjected to before loading this cargo of bones, are all in the dark and unknown.

Because of the destruction of the ship's log book by the claimants while this action was pending, we are unable to obtain any evidence as to this outward voyage. It is entirely possible that events occurring on that outward voyage may have rendered her entirely unseaworthy before she reported at Buenos Aires for the voyage here involved.

The destruction of this log opens the way and entitles the libellant to the benefit of the presumption that had the log been produced, its contents would have been unfavorable to the claimants' case.

The rule is well stated by *Professor Wigmore* in his work on *Evidence*, Vol. 1, Sec. 291, page 383, where, after carefully considering the cases, he says:

"The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor."

The claimants' failure to produce evidence as to the seaworthiness of the schooner at the inception of this voyage and the fact that they confined their testimony to a point of time prior to her outward voyage from Philadelphia to Rosario, coupled with the destruction of the log, are, we submit, sufficient to warrant a finding by the court that the outward voyage developed and made clear defects in the vessel that demonstrated her unseaworthiness before the inception of this voyage.

The claimant's witnesses have been most insistent upon the point that all wooden vessels leak to some extent. If this is so, and is such a matter of common knowledge, then it is clear that no mention would be made of this ordinary leakage by the vessel on its outward voyage. Yet Cummins testifies (pp. 150-151) that the master reported to him that the vessel was leaking on her outward voyage.

The only explanation of this report would seem to be either that the testimony that all wooden vessels leak to some extent, is false, which we do not believe, or that on this outward voyage the leakage of the "Twohy" was excessive, which we do believe. Under either explanation the "Twohy" was unseaworthy, and of this unseaworthiness her master and owners had knowledge.

The claimants have endeavored at great length, as did the owners of the "Edith Olcott" in the case of *Benner Line v. Pendleton*, to establish the seaworthiness of the vessel. Like the owners of the "Edith Olcott" they have failed to do so, and have failed because the facts were against them and the vessel was not in fact seaworthy at the inception of the voyage as the subsequent events clearly and undeniably proved.

The burden was clearly on the claimants and the vessel to establish the seaworthiness at the inception of the voyage, and just as clearly they have entirely failed to support this burden.

We submit that this case is flatly ruled by the decision of the lower courts, affirmed by this court in the case of the *Benner Line v. Pendleton*, above quoted, and that it cannot be seriously contended that the "John Twohy" was seaworthy at the time of the inception of her voyage here in question.

For the damages flowing from this unseaworthiness it is clear that the libellant was entitled to a decree.

2. THE LOSS AND DAMAGE.

As above set out, libellant's damages were of two kinds, viz.:

- (a) Loss arising from injury to a part of the cargo delivered in a damaged condition.
- (b) Loss arising from the non-delivery of a portion of the cargo.

These items we will consider in order.

A. Loss Arising From Injury to a Part of the Cargo Delivered in a Damaged Condition Was Properly Awarded to Libellant.

It is for this item that the Court below awarded to the libellant, the full amount claimed. The facts in this connection are these:

A part of the cargo, weighing gross 389,407 pounds was found on its discharge to be wet and very dirty (Record, p. 57). Burrichter, a witness for the libellant, describes this part of the cargo (Record, p. 75):

"Those bones were removed from the hold when we reached down close to the skin of the vessel, down near the keel, and we had notified the owners of the cargo that they were being taken out wet. We were instructed to put those aside. We had piled them in a distinct pile from the sound portion, and they were very dirty, very dark, and wet with water, soaked, and with an oily substance which had come out of the keel, and those bones were a very unsatisfactory portion of the cargo."

and again, the same witness (Record, p. 82):

"I think I called them dark, dirty bones, very wet, and covered with mud, and slime coated from the bottom of the vessel."

These wet and damaged bones weighed 389,407 pounds gross (Lyons, Record, p. 57). By tests conducted by the consignees it was determined that the excess moisture was sixteen per cent. or 62,305 pounds, making the net weight of damaged bones 327,102 pounds (Burrichter, Record, pp. 77-78; Stoeher, Record, pp. 62-63). The libellant settled with the buyers of the bones and took payment on the basis of this excess moisture determination (Burrichter, p. 78), and the claimants here settled their claim for freight on the same basis (Record, pp. 38, 71).

The undisputed evidence of the witness Burrichter is that these damaged bones were worth \$5.70 per ton less than the sound portion of the cargo which was worth \$27 per net ton; the damaged bone being worth only \$21.30 per net ton.

Burrichter testified that \$21.30 was a fair price for the damaged bone, and the market price so far as

there was a market, that it was the price at which the sellers of the bone settled with the purchasers of the cargo after extensive inquiries and offers to sell to others (Burrichter, Record, pp. 78, 79, 80, 91, 94).

This evidence is not in any way impeached, contested or controverted by the claimants and may be taken as conceded.

It is in fact supported by the clear evidence of the witness Stoeck, who testifies (Record, pp. 66, 69), that the damaged bones were found to be deficient in their most essential elements, ammonia, and phosphoric acid, and by the statement of Burrichter (Record, pp. 80, 81), where he testified as follows:

"Q. What was necessary to be done for these bones to make them saleable?

A. There were four or five different expenses. The first one was the expense in connection with the handling of these bones because they had been separated from the sound portion. That meant carting and handling to a separate pile. The bones had to be dried out before they could be used. They were very dirty and wet. They could not be used in the mill by themselves. The chemist explained that they were deficient in ammonia and phosphoric acid. In order to make them available to use, it was necessary to buy high-priced material, which runs very high in nitrogen, or ammonia, which is the trade term, and combine it with the bones. Also it was necessary to use a small percentage in the grinding of the wet bones with a good portion of the sound bones. You cannot grind wet bones. They will give a bone meal which results very dark in appearance. They were dirty. We cannot sell dark bone meal. It is necessary to put it in with the whiter, cleaner bones, making the resultant bone meal lighter in color."

The existence and amount of this damage, being thus ascertained there remains to be considered only its cause.

That the damage was due to the unseaworthiness of the "Twohy" we feel is amply demonstrated in the preceding argument bearing on that vessel's condition.

The damage was caused by constant soaking in sea water, which dissolved some of the soluble constituents of the bones and brought the dirt, slime and mud out of the bilges and coated the bones therewith.

The existence and nature of this damage were necessarily the direct result of the unseaworthy condition of the "Twohy," for which the vessel and her owners are answerable, and it is, consequently, submitted that the finding of the lower court that the vessel was unseaworthy, and its award of damages for the injury to the cargo, should be and remain undisturbed.

B. The Libellant Was Entitled to a Decree for Loss Due to Short Delivery Clearly Proved to Have Occurred Through the Unseaworthiness of the "John Twohy."

1. The Intake Weight.

The intake weight of the cargo was prima facie established by the bill of lading—a clean bill—which was admitted by the pleadings and which acknowledged, without qualification, receipt of a full cargo of bones weighing 1,210,000 kilos, equivalent to 2,670,345 pounds avoirdupois, as admitted by paragraph 5 of the answer.

The claimants offered no evidence sufficient to rebut this prima facie proof of the intake weight, as will be hereafter more fully discussed.

The correctness of the bill of lading weight is strongly supported by additional evidence.

Captain Forsyth, master of the schooner, called as a witness on behalf of the claimants, described

(Record, p. 162), the careful method by which these bones were weighed as they were being loaded. The fact that the captain was satisfied to sign a clean bill of lading for this cargo without qualifying the statement of quantity by inserting the words, "shipper's weight," "weight unknown," "said to weigh" or any other equivalent expression is most persuasive of its correctness.

It further appears that this libellant had no incentive to pad the weights, inasmuch as the cargo was sold by it on the basis of the out-turn weight and also that the only person who might be interested in padding the intake weight, the stevedore, had, by the master's testimony (Record, pp. 162-163), nothing to do with the weighing.

Under these circumstances, it is submitted that the intake weight is clearly established as being 2,670,345 pounds.

2. *The Out-turn Weight.*

The out-turn weight, while a little more involved, is clearly established and has at no point in the case been disputed.

It was clearly shown by the witness Lyons (Record, p. 57), that the actual gross out-turn weight on the whole cargo was 2,583,581 pounds, of which 389,407 pounds were wet.

By the testimony of the witnesses Stoehrer (Record, pp. 62 and 63), and Burrichter (Record, p. 77), it was clearly established that the excess moisture in the 389,407 pounds of wet bones was sixteen per cent., or in weight 62,305 pounds.

No attempt has been made so far in this case, and we do not assume that any will be made in this court, to attack or impeach the correctness of this weight, but it should be mentioned in connection therewith, that the libellant (Record, pp. 38, 71, 78), settled with its

purchaser upon this basis and that the claimants in this cause settled with the libellant, upon this basis, their claim for freight for the transportation on this cargo from Buenos Aires to Philadelphia.

3. *The Shortage.*

Deducting from this intake weight of 2,670,345 pounds the out-turn weight of 2,521,276 pounds, leaves a net shortage of 149,069 pounds. The value of this quantity of bone at the time and place of delivery is undisputed and was \$27 per net ton of 2000 pounds, less freight at the rate of \$6 per gross ton of 2240 pounds, or \$1613.14, the libellant's claim having been originally made in the sum of \$1612.26 through a mathematical error in calculation.

4. *Discussion.*

(a) *The Law.*

Reference to the bill of lading (Record, p. 45), discloses that it acknowledges receipt of

"a full and complete cargo of bones weighing one million two hundred and ten thousand kilos, marked and numbered as per margin,"

and in the margin appears:

"1,210,000 kilos bones. In this quantity is included 12,474 kilos in 287 bags."

Nowhere in the bill of lading are these two statements of the quantity of bones in any way qualified by the insertion of "weight unknown," "shipper's weight," or any of the usual similar expressions.

It is well established that a bill of lading which acknowledges receipt of a quantity of goods without more, is strong prima facie evidence of the correctness of the quantity stated and until contradicted by the

most satisfactory proof to the contrary, is conclusive on the point.

The Lady Franklin, 8 Wallace 328;

Planter's Fertilizer Co. v. Elder, 101 Fed. 1001;

DeSola v. Pomares, 19 Fed. 373.

In *The Presque Isle*, 140 Fed. 202 (D. C. N. D. N. Y.), 1905, it was said:

"It is uniformly held that a bill of lading is prima facie evidence of the receipt of the merchandise and its condition at the time of delivery (4 Amer. & Ency. of Law, p. 728; *Nelson v. Woodruff*, 66 U. S. 136, 17 L. Ed. 97; *Ellis v. Willard*, 9 N. Y. 529; *The T. A. Goddard* [D. C.], 12 Fed. 174; *Lazarus v. Barber* [C. C. A.], 136 Fed. 543)."

And in *James v. Standard Oil Co.*, 189 Fed. 719 (D. C. So. D. N. Y.), the Court, holding that the vessel had conclusively established the delivery of all the cases received on board, held that the presumption arising from the statement of quantity in the bill of lading was overcome.

Holt, J., said:

"This is the number stated in the bill of lading, and the statement in the bill of lading of the number of cases received is strong prima facie evidence of such receipt, but it is not conclusive."

On appeal the decision was affirmed, 191 Fed. 827 (C. C. A., 2nd Cir.), Judge Ward saying, page 828:

"The bill of lading in respect to the quantity received is a receipt and, though entitled to great weight as an admission by the ship, it is not conclusive. The burden lies upon the ship of thoroughly satisfying the Court that she actually has delivered all the cargo she has received, and that the bill of lading is erroneous."

Under these authorities and the circumstances of this case, the bill of lading weight must stand as correct unless the ship, in the words of Judge Ward, "*thoroughly satisfies the Court that she actually has delivered all the cargo she has received, and that the bill of lading is erroneous.*"

The rule being thus well settled by the decided cases, the question arises as to whether the vessel has in this case rebutted the presumption arising out of the admission contained in the bill of lading.

We submit that the ship does not sustain this burden so long as she leaves open and unanswered a reasonable explanation of the shortage, supported by and consistent with all the facts in the case, and under which she would be liable. In other words, the ship does not sustain the burden until she has conclusively established that there was no loss, and consequently the bill of lading weight was wrong, or else conclusively demonstrates that the loss was due to a cause for which the ship was not responsible.

(b) *Four Possible Explanations.*

In this case there are four possible explanations of the shortage:

First.—Mistake in the intake or bill of lading weight.

Second.—Mistake in the out-turn or delivered weight.

Third.—Natural shrinkage.

Fourth.—That the part of the cargo not delivered was pumped out on the voyage.

If the shortage was due to either of the first, second or third causes, the vessel would be excused from liability; if to the fourth cause, it would have to respond in damages.

So far in the case there has been no dispute as to the out-turn weight. The claimants contended that the shortage was due to mistake in the bill of lading or intake weight, to natural shrinkage or to a combination of the two. The libellant consistently maintained that the undelivered cargo was pumped overboard, and that the bill of lading weight was correct.

Bearing in mind that the burden rests upon the ship to "*thoroughly satisfy the Court that she actually has delivered all the cargo she has received and that the bill of lading is erroneous,*" let us examine the evidence to see how far, if at all, it sustains each or any of the four possible explanations of the shortage.

1. *The Intake Weight Was Correct.*

The unqualified statement of the weight of the cargo in the bill of lading is very strong *prima facie* evidence of its correctness, which in this case is supported by the other evidence in the case.

Captain Forsyth, the master, called as a witness on behalf of the claimants, testified that libellants' men weighed the bones as they were put aboard the schooner, and (Record, p. 162), described the method used, which seems to be careful and exact. He said:

"They have a little trolley track lying in the yard, and they have a little flat trolley and the men will fill those baskets. This little trolley car is weighed in the morning with so many empty baskets. Then they will fill those empty baskets and put them on the trolley car, and run them down and put them on the scales, and each man will take a basket and carry it across the street and dump it down the hold."

In its essential particulars this system of weighing is the same as that which was used when the vessel was discharged, and which gave such satisfactory results.

The captain was so satisfied with the weighing at Buenos Aires that he was content to sign a clean bill of lading without inserting any of the customary qualifying phrases, such as "shipper's weight," "said to weigh," "weight unknown," etc., and presumably paid the stevedore on the basis of the weight shown.

The shipper, the libellant, had no incentive to pad the weights inasmuch as the cargo was sold on the delivered weight.

The stevedore, the only person interested in padding the weight, had, as the master testified (Record, pp. 162-163), nothing to do with the weighing.

All these matters tend most strongly to support the correctness of the bill of lading weight, and to give it an evidential value much greater than its mere presence in the bill of lading.

Against these facts there is no countervailing evidence sufficient to rebut them.

The captain testified that he delivered all the cargo he received. This is a mere statement of a conclusion, and if it were to be given controlling weight, shippers and consignees would be placed entirely at the mercy of unscrupulous masters. The other evidence does not support the captain's averment, which was predicated, as appears from his later testimony, on the fact that when the loading was completed, the hatches were closed and battened down, and were not again opened until the vessel berthed at Philadelphia, and that there was no opportunity for anyone to steal any of the cargo.

As we will point out later, these facts are entirely consistent with that which we contend is the true theory—namely, that the missing part of the cargo was pumped overboard with the water which leaked into the vessel, because of her unseaworthiness.

In this connection it is to be noted that the captain qualified his statement that he had delivered all

the cargo he received, when on cross-examination he admitted (Record, p. 171), that the fine particles of bone might have been pumped overboard.

Manifestly the statement of the captain, qualified as it is by his admissions on cross-examination, is not such evidence as will thoroughly satisfy the mind of the Court that the ship here delivered all the cargo she received, and especially is this true when we consider that it leaves entirely open the possibility, which we will later demonstrate to be the fact, that the cargo called for by the bill of lading, and not delivered, was actually pumped overboard as the result of unseaworthiness of the vessel.

We feel that it cannot for a moment be successfully maintained that a ship can rebut the strong prima facie evidence of an unqualified admission in a bill of lading by an explanation which leaves entirely unanswered a wholly reasonable explanation of the loss which is entirely consistent with all the facts proved in the case.

The only other evidence which it could be argued might tend to impeach the correctness of the bill of lading weight is that referred to by the District Court where it calls attention to the fact that although the bill of lading calls for 287 bags of an average weight of 98 pounds apiece, the out-turn shows the delivery of 241 bags, averaging in weight about $84\frac{1}{2}$ pounds each.

A further examination of the evidence, however, discloses that there is no basis to support the presumption sought to be raised.

In addition to the 241 bags counted, a very considerable number of bags were broken, and were heaved up on deck, together with the bones they had contained.

No one counted the broken bags, and when the master was asked by the Court whether he thought as

many as forty-six bags were broken, replied, "They must have been" (Record, p. 161).

The presumption that there was a shortage in the number of bags in the out-turn is purely speculative as there is no evidence whatsoever as to the actual number of bags delivered.

So, too, with any argument based on the difference between the average intake and out-turn weights of the bags.

These bags were of all sizes, and in no way uniform in weight or otherwise. It is exceedingly doubtful whether they were tightly sewed, and it is most likely that a great quantity of the contents could have fallen out, even from the bags that were discharged with bones still in them.

The method of loading was exceedingly likely to break the bags, as was also the working of the cargo on the voyage from Buenos Aires to Philadelphia, and under the conditions attending the loading and carriage of this cargo, and the rough handling to which it was subjected, the bags most likely to break would be the ones most heavily filled.

Any argument based on the difference between the average intake and out-turn weights of the bags is therefore entirely speculative.

It is thus apparent that to argue from the difference in count and average weight of the bags of bones, is to pile speculation upon speculation to reach a result so wholly speculative as to be impossible of belief.

The existence of the shortage is equally consistent with any explanation that may be made of it, and consequently cannot be urged as impeaching the correctness of the bill of lading weight.

We, therefore, submit that the evidence in this case tends much more strongly to support than it does

to impeach the correctness of the intake weight, as set forth in the bill of lading.

Especially is this true in view of the fact that the evidence most clearly establishes an explanation of the shortage entirely consistent with the correctness of the bill of lading weight, and much more reasonable than the appellants' theory that the bill of lading weight is erroneous.

2. The Correctness of the Out-turn Weight Is Not Questioned.

The out-turn weight has not been, and, we assume, will not be, questioned in this case. Its correctness was clearly demonstrated by the testimony of the witnesses, Lyons, Stoher and Burrichter. The bones were carefully weighed as they were taken from the ship, and the excess moisture in the wet portion of the cargo was accurately determined by carefully and properly conducted tests. The claimants accepted payment of their freight, and the libellant settled with the vendee of the cargo on the basis of the weight thus determined, and there is nowhere in the evidence any suggestion that it is not entirely correct.

The out-turn weight must therefore be taken as conclusively established.

3. There Was No Natural Shrinkage in Weight on the Voyage.

In their efforts to avoid liability for the shortage, claimants argue that there is generally shortage in these bone cargoes. This may in fact be admitted. The only testimony as to the extent of such a usual shortage, however, is that of the witness, Burrichter, who testified that the customary shortage is from one to two per cent. as a fair average; that three per cent. or four per cent. would be very unusual. In the pres-

ent case, the shortage is approximately five and six-tenths per cent., far in excess of even what would be considered very unusual.

Clearly this defense, if sustained on the facts in the case, could not be available to the schooner to any extent greater than the ordinary or customary shortage of one or two per cent.

We submit, however, that no allowance can in this case be made for any shortage on the ground of customary shrinkage inasmuch as the facts here exclude the possibility of the existence in this case of the causes of such shrinkage on the ordinary voyage.

From the evidence, it appears clearly that the only explanation that can be given of the ordinary shortage is that bones dry out during the voyage (Record, p. 158). It also appears from the evidence that bones when soaked in water act like sponges, and become saturated, and when exposed to dampness will absorb moisture from it (Record, pp. 77 and 78).

Under these conditions, not only was there in this case no opportunity for any drying out of the cargo, but, on the contrary, under the conditions surrounding the transportation of this cargo there should be an accretion in weight rather than a shortage.

On the voyage of the "Twohy" here in question the undisputed evidence is that for a period of upwards of two months her hold constantly had a considerable quantity of water in it, that at times this water was five feet deep in the hold—and that during this period the vessel was leaking at the rate of six inches an hour. The hatches were tightly battened down and covered.

A great quantity of the bones was constantly soaking in the water in the hold, and, coming up through the tropics, it is clear that the atmosphere in the space in the hold of the vessel above the water must have been very moist.

These facts rendered it altogether impossible for the bones in this cargo to dry out on the voyage, and it is manifest that in this particular case the explanation of the shortage cannot be sustained as a usual and customary thing.

The shortage here was far in excess of the average and, in fact, *was practically double what would be and is considered a very unusual and excessive shortage.* In the second place, the cause of the usual shortage, viz., drying out on the voyage, could not have been and was not operative in this case. Owing to the constant flooded condition of the hold of this vessel, the cargo here should have shown on delivery an increased rather than a decreased weight.

The excess moisture contained in the wet bones alone was much more than sufficient to counterbalance the one per cent. or two per cent. loss in weight which it was stated would be the fair average. In addition to this, however, we have in the present case a difference of 86,746 pounds between the established intake weight and the gross out-turn weight. Manifestly the usual or customary drying out on the voyage cannot explain the loss existing in this case.

From the foregoing discussion, it is manifest that the three possible explanations of the shortage which would free the ship from liability are not supported by the evidence in this case, and it remains to consider the fourth possible explanation.

4. The Part of the Cargo Not Delivered Was Pumped Overboard During the Voyage.

The fourth possible explanation, the one which the evidence demonstrates was in fact the true cause of the shortage, is that the missing part of the cargo was pumped overboard during the voyage in the form of ammonia and phosphoric acid in solution, and in the form of fine particles of bone.

For two months on this voyage this vessel was constantly leaking at the rate of six inches of water an hour. At times there was as much as five feet of water in the hold. During all this time a large quantity of bones were constantly soaking in the water, and, when chemically analyzed after being discharged at this port, were found to be largely deficient in certain of their soluble constituents—in the ammonia to the extent of $\frac{3}{4}$ per cent.; in phosphoric acid to the extent of $6\frac{1}{2}$ per cent., or, in all, to the extent of 23,795 pounds. It is obvious that to this extent the shortage is accounted for by the pumping overboard of this quantity of ammonia and phosphoric acid in solution.

As to the remainder of the shortage the evidence clearly sustains the theory that it was pumped overboard in the form of fine particles of bone—bone dust. The master, it is true, first testified that the bone could not have gotten into the pumps, but when cross-examined he excluded from his statement the fine bone particles and admitted that these might have been pumped overboard (Forsyth, p. 144).

A very large part of the cargo when loaded was in the form of this fine machine-crushed bone—the process of loading and the motion and working of the cargo during the voyage, all would operate to reduce still more of it to this condition. As Stoeher testified (Record, p. 70):

“Q. When you say these bones were cracked bones, give the Court some idea just how large the bones were.

A. They were various sizes, pieces about the size of, say, a small finger nail, a kernel of corn, and smaller. They are down to very small pieces, and they would break just by the process of abrasion, piece against piece.

Q. So that when you speak of meal, you speak of very, very fine ground bone, and some of this bone was fine bone, was it not?

A. Yes, sir.”

These finer particles would all sift to the bottom of the hold, and thence through the ceiling into the pumps, and thence overboard.

Under ordinary conditions, perhaps, the quantity of bone pumped overboard might seem large; but in view of the heavy leakage, the practically constant pumping and the thousands of tons of water that must have been pumped out of this vessel in two months, while she was leaking at the rate of about twelve feet of water a day, the amount of bone pumped overboard becomes insignificant.

There is nothing in the facts shown or attempted to be shown at the trial which is inconsistent with this last explanation of the shortage, as there is with the others; but, on the contrary, the evidence and the facts clearly point to the last explanation as the true manner in which the shortage occurred.

The foregoing explanations of the shortage are the only ones possible.

Can it be held that the ship has sustained the burden of proving the incorrectness of the bill of lading weight by "*thoroughly satisfying the Court that she actually has delivered all the cargo she has received and that the bill of lading weight is erroneous*" when she in no way has excluded the explanation of the loss which is demonstrated by the overwhelming weight of the evidence to have been the true explanation and under which the ship is liable?

We submit that the evidence most clearly establishes the vessel's liability and that the District Court erred in failing to award to libellant its full claim.

It remains to note a suggestion found in the opinion of the District Court, and which, if the incorrectness were not pointed out, might tend to a perpetuation of the same error as that committed by the trial Judge, who, in his opinion (Record, p. 190), said:

"At the same time, the part of the cargo which had been dissolved by the action of the salt water and thus lost to the shipper would be included in any claim for damage made because of the cargo having become wet. It is, therefore, important to keep clear the distinction between the shortage in the cargo as such and a loss in bulk or weight of the cargo due to the damage from salt water, lest the two claims be permitted to overlap, and in this way there be a double allowance of the damage claim."

From this it is clear that the trial Judge felt that if the libellants' claim were allowed in full, there would be an overlap and double damages awarded. This thought was based on the fact that in showing the nature of the damage to the cargo, libellant showed that the damaged bones were deficient in some of their soluble constituents, and from this the Court reasoned that the allowance of the libellants' claim for damage would also reimburse libellant for the shortage up to the amount of the dissolved and lost constituents of the damaged bone.

This is most clearly and demonstrably wrong. The damage claim is purely and simply the difference between the contract price and the actual market value in its damaged condition of the net delivered weight of the injured portion of the cargo, and is not in any way based on the quantity or value of the missing constituents of this damaged bone.

Furthermore, the error of the trial Court's theory is most clearly demonstrated mathematically by the accompanying table on the opposite page.

From this table it is perfectly obvious that the full allowance of both claims here made on behalf of the libellant-appellee will involve no overlap or double damage whatsoever, but, on the contrary, will only make the libellant whole for the damage it suffered owing to the unseaworthiness of the schooner.

ANSWER TO THE THEORY OF COURT BELOW AS TO OVERLAP AND DOUBLE DAMAGES.

1. If all the boxes called for by the Bill of Lading had been delivered, Libellant would have received:

2,670,345 lbs. @ \$27.00 per 2000 lbs.	
Less Freight on same @ \$6.00 per 2240 lbs.	\$36 049 66
Net receipts	7 152 70
	\$28 896 96

2. Libellant on the cargo actually delivered did receive:

2,194,174 lbs. @ \$27.00 per 2000 lbs.	\$29 621 35
327,102 lbs. @ \$21.30 per 2000 lbs.	3 483 64

Less Freight on 2,521,276 lbs. @ \$6.00 per 2240 lbs.	33 104 90
Net receipts	6 753 42

3. Actual Loss to Libellant

26 351 57

4. If full recovery allowed, Libellant will receive:

Damages for injury to 327,102 lbs. @ \$5.70 per 2000 lbs.	
Damages for short delivery 149,069 lbs. @ \$27.00 per 2000 lbs.	932 24
Less Freight on 149,069 lbs. @ \$6.00 per 2240 lbs.	2 012 43
Net recovery	399 29

\$2 545 39

5. Excess of Loss over Recovery

2 545 38
01

*Through a mathematical error in original calculation of the Libellant's claim the value of the boxes not delivered is stated as \$1612.26—the correct figure is that given above—\$1613.14.

3. THE ACTION OF THE CIRCUIT COURT OF APPEALS WAS IMPROPER.

From the foregoing discussion all the facts involved and the action of the District Court clearly appear. With the record in this condition an appeal was taken by claimants to the Circuit Court of Appeals, which appeal was perfected on April 27, 1918. On December 9, 1918, after having twice asked and obtained continuances of the hearing on appeal, the claimants moved to withdraw their appeal, and over the protest and objection of the petitioner here, the Court granted the claimants' motion on term. On March 14, 1918, a formal order was entered, dismissing the appeal as moved by the claimants.

A. THE ACTION OF THE CIRCUIT COURT OF APPEALS IS INCONSISTENT WITH THE RULES OF THIS COURT IN *IRVINE V. "THE HESPER"* AND *REID V. THE AMERICAN EXPRESS CO.* AND NULLIFIES THE RULE THAT ON AN APPEAL IN ADMIRALTY THE CASE IS TRIED DE NOVO IN THE CIRCUIT OF APPEALS.

Under the decisions of this Court in *Irvine v. "The Hesper,"* 122 U. S. 256, and the many cases following that decision, particularly the recent emphatic approval of its doctrine by his Honor, the present Chief Justice, in *Reid v. American Express Company,* 241 U. S. 544, an appeal in Admiralty vacates the decree of the District Court, and brings the whole case before the Circuit Court of Appeals for a trial de novo.

As stated by Mr. Justice Blatchford in *Irvine v. "The Hesper"* (*supra*), at page 266:

"It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District

Court, and that the case is tried de novo in the Circuit Court. *Yeaton v. United States*, 5 Cranch 281; *Anonymous*, 1 Gallison 22; 'The Roarer,' 1 Blatchford 1; 'The Saratoga' v. 438 Bales of Cotton, 1 Woods 75; 'The Lacille,' 19 Wall. 73; 'The Charles Morgan,' 115 U. S. 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants." (Italics ours.)

This holding was reaffirmed in *Reid v. The American Express Co.* (supra), where his Honor, the present Chief Justice, said:

"It is not denied that in the Second Circuit the right to a de novo trial was considered as settled by *Munson S. S. Line v. Miramar S. S. Co., Limited*, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a de novo trial in the Court below authoritatively resulted from the ruling in *Irvine v. 'The Hesper'*, 122 U. S. 256, a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the *Miramar Case*. Entertaining this view, we do not stop to consider the various arguments which are here pressed upon our attention tending at least indirectly to establish the non-existence of the right of trial de novo in the Court

below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever."

What do these cases mean? Obviously and necessarily they mean what they say, that in an admiralty appeal the Circuit Court of Appeals is not sitting as a court of review, but as a trial court, hearing and determining the case upon the pleadings and proofs submitted in the District Court and any additional proofs that may be properly introduced in the Circuit Court of Appeals.

Is it conceivable that any trial court has the legal discretion, at the defendant's request and over the protest and objection of the plaintiff, to refuse to hear and determine the claim made by the plaintiff against the defendant where the parties and subject matter are properly before the court and within its jurisdiction?

Manifestly it cannot do so; and yet, such is the necessary result of the ruling of the Circuit Court of Appeals in this case, inasmuch as under the decisions in *Irvine v. "The Hesper"* and *Reid v. The American Express Co.*, the Circuit Court of Appeals must be regarded in this case as a trial court.

This point here raised is a novel one, as was recognized in the opinion of Judge Buffington in this case when he says (Record, p. 204):

"We find no reported case involving the precise question here raised."

The decision of the Circuit Court of Appeals in this case has a most far-reaching effect. Its scope is wide and its application broad. If it is to stand, an

appellee in admiralty, a part of whose claim was denied in the District Court, can no longer rely upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, to secure him his right to be heard thereon in the Circuit Court of Appeals. To protect himself he will be under the necessity of assuming the burden and expense of taking a cross appeal, thereby encumbering the record and adding most materially to the expense, annoyance and inconvenience of litigation, increasing its complexities, and in most cases undoubtedly, causing additional delay—already one of the greatest objections and most serious defects in the administration of justice.

It is suggested in the opinion of Judge Buffington in this case that to refuse the motion and hold the appellant not entitled to withdraw his appeal will work a great hardship to the appellant by limiting his control of his litigation. But this suggestion is a mistaken one.

In the words of Mr. Justice Blatchford in *Irvine v. "The Hesper,"*

"When the libellants appealed they did so in view of the rule, and took the risk of the result of a trial of the case de novo."

The appellant, therefore, is confronted by no hardship—he acts with his eyes open.

The result of refusing to permit the appellant in such case to withdraw his appeal over the appellee's objection would, on the other hand, be most wholesome.

It would go far to curb and put an end to the taking of hasty and ill-advised appeals, would secure to the appellee his right to be heard de novo without the necessity of complicating the admiralty procedure by taking a cross appeal, and would prevent the most pat-

ent injustice to an appellee who, in proper reliance upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, has felt secure in his right to be heard, would otherwise find that this right has been swept away from him at a time when his own right to appeal had expired and he was no longer able to avail himself thereof.

While there seem to be no Federal Court decisions on the precise point here raised, there have been one or two State Court decisions thereon and these plainly and clearly support the rule for which we here contend.

In *Peterson v. Frey*, 109 Mich. 689, a case where an appeal was taken under a statute which provided that the appellate court should "*become possessed of the case, the same as if it had been originally commenced in said Appellate Court,*" it was held that an appellant could not dismiss his appeal without the consent of the appellee.

In *Brigham v. Waterhouse*, 32 Texas 468, a case where under the statute an appeal effected a trial de novo in the appellate court, it was held that the appellant could not withdraw his appeal without the consent of the appellee.

The rule announced in these cases is, we submit, correct and consistent with good practice and the decisions of this Court.

What discretion an appellate court has to permit the withdrawal of an appeal is necessarily limited by legal precedents and rules, and certainly should not and cannot be exercised to deprive an appellee of a valuable and substantial right.

In the present case, and in all cases where by an appeal the cause is brought before the appellate court

for a trial de novo, an appellee, a part of whose claim has been denied in the District Court, has a right to have the appellate court hear and determine his claim de novo, as a court of first instance.

This right is a valuable and substantial one, of which the appellee should not be deprived without his consent, and we submit that it is no more within the legal discretion of the appellate court in such a case to deprive the appellee of this right, than it is within the discretion of any other trial court at the defendant's request and over the plaintiff's objection to refuse to hear and determine on its merits a cause in which the parties and the subject-matter are properly within its jurisdiction and before it for determination.

IV. CONCLUSION.

In conclusion we submit:

First.—That the action of the Circuit Court of Appeals in permitting the claimants in this case to withdraw their appeal was improper, inconsistent with the decisions of this Court, and, if allowed to stand uncorrected, will complicate the admiralty practice, go far to nullify important decisions of this Court and will work the greatest injustice to litigants who act in reliance upon the decisions of this Court for the protection of their rights and the conduct of their litigation.

Second.—That the Circuit Court of Appeals in this case should have heard and determined on its merits the whole case brought up by the appeal from the District Court.

Third.—That the action of the District Court in refusing to award the petitioner the full damages claimed by it was erroneous and should be reversed.

Fourth.—That the petitioner before this Court should be awarded the full amount of its claim with damages equivalent to interest thereon from January 15, 1916, and costs.

Respectfully submitted.

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner.

WILLIAM J. CONLEN,
Advocate.

SUPREME COURT OF THE UNITED STATES.

No. 84.—OCTOBER TERM, 1920.

T. M. Duche & Sons, Ltd., Petitioner, vs. American Schooner "John Twohy," Her Tackle, etc., Albert D. Cummins and Howard Compton, Claimants.	} On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
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[February 28, 1921.]

Mr. Chief Justice WHITE delivered the opinion of the Court.

Consequent on the allowance of a writ of certiorari, the case is here to review the action of the court below in granting, in an admiralty case there pending, a motion for leave to withdraw an appeal made by the respondents, who were there appellants. 256 Fed. 224. The situation thus arose: The schooner "John Twohy," was chartered to carry a cargo of bones from Buenos Aires to Philadelphia. The voyage was made and, following the discharge of the cargo, the charterers, who are the petitioners, libeled the vessel asserting claims (1) for failure to deliver part of the cargo which, as evidenced by the in-take weights recited in the bill of lading, had been loaded on the vessel at Buenos Aires, and (2) for damage by sea water to part of the delivered cargo in consequence of leakage alleged to be due to the unseaworthiness of the vessel.

Holding that the recital in the bill of lading of the in-take weights was but *prima facie* evidence and that the proof showed the delivery of all cargo received on board, the court dismissed the libel as to the first claim. As to the second, however, it found that the damage from leakage had resulted from unseaworthiness, and sustained that claim.

The claimants alone appealed, and after having twice obtained a continuance, moved for leave to withdraw the appeal. Opposing this motion, the libellants asserted that under the practice in admiralty in that circuit an appeal opened up the whole case for reconsideration in the appellate court; that relying upon that

practice they had refrained from themselves taking an appeal from the ruling of the trial court denying their claim for non-delivery of cargo; that, owing to the continuances allowed the appellants, the time within which the libellants might have taken an appeal had expired, and if the appellants prevailed in their motion the libellants would be without means of obtaining a review of the adverse action of the trial court.

Coming to consider these contentions, the court held them to be without merit, first, because the libellants, by themselves taking an appeal, could have required the appellate court to proceed and decide the same; second, because, having failed to adopt that course they could not complain if the court, in the exercise of its discretion, declined to grant them as a legal right that which they might have made such had they availed themselves of the appropriate procedure; and third, because the court conceived that the allowance of the withdrawal of the appeal would be in furtherance of the due administration of the admiralty in that it would tend to put an end to litigation, would afford appellants time within which to exercise a cooler judgment, would forewarn all persons to themselves appeal if they desired to insure a review of unfavorable decisions, and would prevent the hardship which would result from a contrary ruling, as many would be deterred from appealing from unjust decisions if, having once embarked on that course, they were powerless to withdraw. Upon compliance with certain conditions prescribed by the court, appellants' motion was therefore granted.

We are unable to give our approval to this result or the reasons by which it was sustained. As recognized by the court, the case of *The Canada*, 241 Fed. 233, had settled in that circuit that in admiralty an appeal by either party operated to remove the case to the appellate court for a trial *de novo*. The decision was based solely upon the previous rulings of this court in *Irvine v. The Hesper*, 122 U. S. 256, and *Reid v. American Express Co.*, 241 U. S. 544. In *Irvine v. The Hesper*, Mr. Justice Blatchford, speaking for the court, said:

"It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton v. United States*, 5 Cranch 281; *Anonymous*, 1 Gallison 22; '*The Roarer*,' 1 Blatchford 1; *The Saratoga v.* 438

Bales of Cotton, 1 Woods 75; 'The Lucille,' 19 Wall. 72; 'The Charles Morgan,' 111 U. S. 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

And in the *Reid* case this court, although pressed to repudiate the practice as opposed to the weight of adjudged cases, declined to do so and reaffirmed the ruling made in *Irvine v. The Heeper*.

In view, therefore, of the settled law as to the effect of appeals in admiralty, we are of opinion that the libellants were justified in regarding the appeal taken by the claimants as securing to libellants the right to be heard in the appellate court without the necessity of perfecting a cross-appeal in order to preserve that right. To hold, then, that the appellate court could nevertheless, without affording the libellants an opportunity to be heard, enter a decree the plain effect of which was to deny one of the two claims for which the libel was brought and which, in view of the settled effect of the appeal, the libellants could not be presumed to have abandoned, would be to subject them to a wrong without a remedy, even if it did not amount to a denial of due process of law.

And this renders it unnecessary to consider the supposed advantages which would arise from the adopting of a new rule, since if the wisdom of so doing be *arguendo* conceded, that concession would not justify the misapplication of the existing rule and the destruction of rights vested in reliance, not only upon its existence, but upon the discharge of the duty to enforce and apply it.

It follows that the decree of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk Supreme Court, U. S.